(26,271)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 804.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF WISCONSIN *EX REL.* CITY OF MILWAUKEE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

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1 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Wisconsin before you or some of you being the highest court of law or equity of the said State of Wisconsin in which a decision could be had in the said suit between The Milwaukee Electric Railway & Light Company, plaintiff in error, and State of Wisconsin ex rel. City of Milwaukee, defendant in error, wherein was drawn in question (1) the validity of an ordinance of the City of Milwaukee, Wisconsin, on the ground of its being repugnant to the Constitution and Laws of the United States, and the decision was in favor of its validity, and (2) wherein was drawn in question the validity of an authority exercised under said ordinance on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity, and (3) wherein the said The Milwaukee Electric Railway & Light Company, plaintiff in arror, set up and claimed titles, rights, privileges and immunities under the Constitution of the United States, and the said decision was against the titles, rights, privileges and immunities so specially set up and claimed under said Constitution; a manifest error hath happened
2 to the great damage of The Milwaukee Electric Railway & Light Company, plaintiff in error, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States together with this writ so that you have the same in the Supreme Court at Washington, D. C. within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Edward Douglass White, Chief Justice of the United States, this 22nd day of November in the year of our Lord One Thousand Nine Hundred and Seventeen.

[Seal U. S. District Court, Western Dist. of Wisconsin, Madison.]

F. W. OAKLEY,
Clerk of the District Court of the United States for the Western District of Wisconsin.
By FRED W. FRENCH,
Deputy Clerk.

1—804

Allowed by me this 22d day of November, 1917.

JNO. B. WINSLOW,
Chief Justice of the Supreme Court of the State of Wisconsin.

STATE OF WISCONSIN,
Supreme Court, ss:

The return to the within writ appears by the schedule hereto annexed.

The return of the Justices of the Supreme Court of the State of Wisconsin.

[Seal Supreme Court of Wisconsin.]

ARTHUR A. McLEOD,
Clerk of Supreme Court, Wisconsin.

3 [Endorsed:] In the Supreme Court of the United States. The Milwaukee Electric Railway & Light Company, Plaintiff in Error, vs. State of Wisconsin ex rel. City of Milwaukee, Defendant in Error. Writ of Error. Original. Miller, Mack & Fairchild. Filed Nov. 22, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

4 STATE OF WISCONSIN:

In Supreme Court.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Plaintiff in Error,

vs.

STATE OF WISCONSIN ex Rel. CITY OF MILWAUKEE, Defendant in Error.

To the Honorable John B. Winslow, Chief Justice of the Supreme Court of the State of Wisconsin, and to the other Justices of said Supreme Court:

The petition of The Milwaukee Electric Railway & Light Company, plaintiff in error, respectfully represents as follows:

1. That at all the times hereinafter mentioned your petitioner was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin and duly authorized among other things to conduct a street railway business, and at all said times was and still is engaged in the business of carrying passengers for hire in the City of Milwaukee on various streets, among them being Center Street extending from Seventeenth Street to Teutonia Avenue, and elsewhere, and that Center Street is an east and west street in the northern portion of said city, that Seventeenth Street is a north and south street crossing

said Center Street, and that Teutonia Avenue is a street running in a northwesterly and southeasterly direction crossing said Center Street about six blocks east of said Seventeenth Street.

5 2. That the defendant in error, the City of Milwaukee, is a municipal corporation organized and existing under and by virtue of the laws of the State of Wisconsin.

3. That on the 11th day of August, 1916, the City of Milwaukee filed in the office of the clerk of the Circuit Court for the County of Milwaukee, State of Wisconsin its petition praying that a writ of mandamus be issued commanding your petitioner to pave the railway zone on Center Street from Teutonia Avenue to Seventeenth Street with asphalt upon a concrete foundation, all of the same kind, character and specifications as that recently laid by the City of Milwaukee outside of the railway zone of the Railway Company, as provided in an ordinance passed by the Common Council of the City of Milwaukee, Wisconsin on November 8, 1915.

4. That upon the filing of said petition the Circuit Court of Milwaukee County, Wisconsin issued an alternative writ of mandamus commanding and enjoining your petitioner to pave Center Street from Teutonia Avenue to Seventeenth Street and one foot outside of each of the rails thereof with asphalt upon a concrete foundation, all of the same kind, character and specifications as that recently laid by the City of Milwaukee, Wisconsin in said portion of Center Street, outside of the zone mentioned herein, and further commanding your petitioner to desist from paving the same with waterbound macadam, or that your petitioner show cause to the contrary before the Honorable Circuit Court for the County of Milwaukee.

6 5. That thereafter your petitioner duly served and filed its return to said alternative writ of mandamus.

6. That thereafter the City of Milwaukee demurred to your petitioner's return to the alternative writ of mandamus on the ground that the said return shows on its face that it does not state facts sufficient to constitute a defense to the alternative writ.

7. That thereafter your petitioner filed an amended return to the alternative writ of mandamus alleging that it operated its street cars on Center Street in the City of Milwaukee, Wisconsin under a franchise granted by the City of Milwaukee September 21, 1891, to The Milwaukee Street Railway Company, one of the predecessors and assignors of The Milwaukee Electric Railway & Light Company, which franchise contained no provision on the subject of paving repairs. Said franchise was amended by an ordinance passed by the Common Council of the City of Milwaukee January 2, 1900, which, among other things, provided, that there was given to The Milwaukee Electric Railway & Light Company its successors and assigns, the right to lay, construct, maintain and operate a single or double track for street railways for carrying passengers, upon the conditions named in said ordinance, which among other things, provided:

"It shall be the duty of said Railway Company at all times to keep in good repair the roadway between the rails and for one foot on

the outside of each rail as laid, and the space between the two inside rails of its double tracks with the same material as the city shall have last used to pave or re-pave these spaces, and the street previous to such repairs, unless the said Railway Company and the Board of Public Works of said city shall agree upon some other material, and said company shall then use the material agreed upon."

7 Said amended return further alleged that your petitioner succeeded to the rights of its assignor under said ordinance of September 21, 1891 prior to January 2, 1900 and on that date was operating on said portion of Center Street pursuant thereto; that for several years prior to the filing of said petition by the City of Milwaukee all of said portion of Center Street from curb to curb was composed of macadam and that in August, 1915 the City of Milwaukee paved the portion on either side of the track zone with asphalt pavement on a concrete foundation; that on November 8, 1915 the Common Council of the City of Milwaukee passed the pretended ordinance mentioned in the petition of the City; that at the time the alternative writ was issued The Milwaukee Electric Railway & Light Company had wholly removed the east-bound track on Center Street between Teutonia Avenue and Seventeenth Street for purpose of reduction to the grade of said street, and had reconstructed about one-half thereof to the grade of said street, and that it was about to remove its west-bound tracks for said purpose and that it intended to complete the operation of reducing its tracks to the grade of said street and then put said railway zone in good repair with macadam, that being the same material the City had last used in said space and street previous thereto; that the ordinance of November 8, 1915 was not a reasonable rule or regulation under Section 1862, Statutes, because (*a*) it is not a rule or regulation within the meaning of that section; and (*b*) if the matters covered thereby might be the subject of a rule or regulation the ordinance would be unreasonable in that it impaired and violated the

8 contract which The Milwaukee Electric Railway & Light Company had with the City of Milwaukee within the meaning of Section 1 of Article 10 of the Constitution of the United States, and the enforcement of said ordinance would deprive The Milwaukee Electric Railway & Light Company of its property without due process of law in violation of Section 1 of Article 14 of the Amendments to the Constitution of the United States; that compelling The Milwaukee Electric Railway & Light Company to pave under the ordinance of November 8, 1915 will unreasonably reduce the earning capacity of the Company below a reasonable return on the investment and thereby deprive the Company of its property without due process of law in violation of Section 1 of Article 14 of the Amendments to the Constitution of the United States.

8. That said cause came on for hearing before said Circuit Court of Milwaukee County, the parties appearing by their respective attorneys, and your petitioner contended in and before said Circuit Court that the ordinance set forth in said petition was invalid for the reason that it impaired and violated the contract which your

petitioner had with the City of Milwaukee by virtue of the ordinance granting the franchise on September 21, 1891 and by virtue of the ordinance of January 2, 1900 and the enforcement of said ordinance would deprive your petitioner of its property without due process of law, upon the grounds and for the reasons more specifically set out in the assignments of error hereto attached.

9. That the said Circuit Court sustained the validity of the ordinance of November 8, 1915 and on the 18th day of November, 1916 made and entered an order sustaining the demurrer to the return and the amended return of your petitioner to the alternative writ of mandamus.

10. That thereafter your petitioner removed said cause to the Supreme Court of the State of Wisconsin by appealing from said order of the Circuit Court sustaining the demurrer to its return and amended return to the alternative writ of mandamus.

11. That on the 13th day of March, 1917 the Supreme Court of the State of Wisconsin rendered its opinion affirming the order of the Circuit Court of Milwaukee County, sustaining the demurrer to your petitioner's return and amended return to the alternative writ of mandamus.

12. That thereafter and on the 21st day of April, 1917, the record in this case was remitted from the Supreme Court of Wisconsin to the Circuit Court of Milwaukee County, Wisconsin and was filed in the office of the Clerk of said Circuit Court.

13. That thereafter and on the 2d day of June, 1917, the Circuit Court of Milwaukee County entered an order for judgment to the effect that judgment be entered in this action directing the immediate issuance of a peremptory writ as prayed for in the petition.

14. That on the 8th day of June, 1917, judgment was rendered by the Circuit Court of Milwaukee County directing that a peremptory writ of mandamus issue forthwith commanding your petitioner to put in good and thorough repair all that portion of Center Street extending from Teutonia Avenue to Seventeenth Street between lines drawn one foot outside of each of its outside rails therein by paving the same with an asphalt pavement upon a concrete foundation, all to be of the same kind, character and specifications as that used by the City of Milwaukee in paving said portion of said Center Street outside the street car zone herein mentioned; and providing further that the City of Milwaukee do have and recover from your petitioner the sum of fifty-seven and 71/100 ($57.71) dollars, costs and disbursements.

15. Thereafter, your petitioner removed said cause to the Supreme Court of the State of Wisconsin by appeal, wherein your petitioner was and is designated as defendant and appellant, and the City of Milwaukee as petitioner and respondent.

16. The said cause coming on for hearing before the Supreme Court of the State of Wisconsin at the August term thereof for the year 1917, was duly argued and submitted on the part of your petitioner and the said City of Milwaukee, and your petitioner, through its counsel, duly argued that said judgment

should be reversed for the reason that the ordinance of September 21, 1891 granting a franchise to the predecessors of your petitioner and the ordinance of January 2, 1900 set forth in your petitioner's return and amended return to the alternative writ of mandamus created contracts between the City of Milwaukee and your petitioner, and that the pretended ordinance of November 8, 1915 attempting to impose upon your petitioner any greater duty than that provided by the aforesaid ordinances would be a law impairing the obligations of contracts in violation of Section 10, Article
11 1 of the Constitution of the United States, and that said judgment and any ordinance or law purporting to compel the City to pave between its tracks in any other manner than that provided by the ordinance of January 2, 1900 was an act of the City of Milwaukee depriving your petitioner of its property without due process of law and was, therefore, in violation of Section 1 of Article 14 of the Amendments to the Constitution of the United States, and that your petitioner especially set up and claimed titles, rights, privileges, and immunities under the Constitution of the United States.

17. That on the 23d day of October, 1917 said Supreme Court of the State of Wisconsin rendered a final decision in said cause, affirming said judgment of said Circuit Court for Milwaukee County, whereby it was adjudged that the said ordinance of the City of Milwaukee dated November 8, 1915 did not violate Section 10 of Article 1 of the Constitution of the United States and did not violate Section 1 of Article 14 of the Amendments to the Constitution of the United States, and the majority of said court filed a written opinion setting forth the grounds upon which the judgment of the said Circuit Court was by said Supreme Court affirmed, to which said opinion on file with the Clerk of said Supreme Court of the State of Wisconsin reference is hereby made.

18. That said Supreme Court of Wisconsin is the highest court of said State of Wisconsin in which a decision of this suit and this matter could be had.

That in and by said final judgment manifest error has happened, to the great damage of your petitioner, because there was drawn in question the validity of an ordinance of the City of Mil-
12 waukee, Wisconsin, and the validity of an authority exercised under said ordinance on the ground of their being repugnant to the Constitution and laws of the United States, and the decision was in favor of their validity, and because titles, rights, privileges and immunities were in said suit claimed by your petitioner under the Constitution of the United States and the decision was against the titles, rights, privileges and immunities especially set up and claimed by your petitioner under such Constitution, all of which will appear more particularly from the assignment of errors, which is filed with this petition and prayed to be considered a part hereof for the purposes of this petition.

Wherefore, your petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Wisconsin, and the judges thereof, that the

errors in said judgment may be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, and that a transcript of the record, proceedings and papers in this case, duly authenticated, may be sent to the Supreme Court of the United States; that citation be granted and signed; that the bond herewith presented be approved and that upon compliance with the terms of the statute in such case made and provided said bond and writ of error may operate as a supersedeas.

Dated this 20th day of November, 1917.

GEO. P. MILLER &
EDWIN S. MACK,
Attorneys for The Milwaukee Electric Railway & Light Company.

13 The writ of error as prayed for in the foregoing petition is hereby allowed this 22d day of November, 1917, the writ of error to operate as a supersedeas with bond in the sum of two hundred and fifty dollars ($250.00), conditioned as the law directs.

[Seal Supreme Court of Wisconsin.]

JNO. B. WINSLOW,
Chief Justice of the Supreme Court of the State of Wisconsin.

14 [Endorsed:] State of Wisconsin, in Supreme Court. The Milwaukee Electric Railway & Light Company, Plaintiff in Error, vs. State of Wisconsin ex rel. City of Milwaukee, Defendant in Error. Petition for Writ of Error. Original. Miller, Mack & Fairchild. Filed Nov. 22, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

15 In the Supreme Court of the United States.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Plaintiff in Error,

vs.

STATE OF WISCONSIN ex Rel. CITY OF MILWAUKEE, Defendant in Error.

This 22d day of November, 1917, The Milwaukee Electric Railway & Light Company, plaintiff in error, by its attorneys, filed herein and presented to me its petition praying that a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Wisconsin may be allowed to bring up for review before the Supreme Court of the United States the final judgment and decision of said Supreme Court of the State of Wisconsin in the cause therein mentioned, and that a citation issue and the amount of the supersedeas bond be fixed, and that a transcript of the record, proceedings

and papers in the cause, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had which may be proper in the premises.

In consideration whereof it is ordered that a writ of error herein be and is hereby allowed, and that said The Milwaukee Electric Railway & Light Company, plaintiff in error, give bond according to law
to the sum of two hundred and fifty dollars ($250.00), which
16 bond when approved shall act as a supersedeas.

Witness the Hon. John B. Winslow, Chief Justice of the Supreme Court of the State of Wisconsin this 22d day of November, 1917.

[Seal Supreme Court of Wisconsin.]

JNO. B. WINSLOW,
Chief Justice of the Supreme Court of the State of Wisconsin.

17 [Endorsed:] In the Supreme Court of the United States. The Milwaukee Electric Railway & Light Company, Plaintiff in Error, vs. State of Wisconsin ex rel. City of Milwaukee, Defendant in Error. Order allowing writ of error. Original. Miller, Mack & Fairchild. Filed Nov. 22, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

18 STATE OF WISCONSIN:

In Supreme Court.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Plaintiff in Error,

vs.

STATE OF WISCONSIN ex Rel. CITY OF MILWAUKEE, Defendant in Error.

Assignments of Error.

Now comes the above named plaintiff in error, The Milwaukee Electric Railway & Light Company, by Miller, Mack & Fairchild, its attorneys, and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Wisconsin in the above entitled matter there is manifest error upon which it will rely in and for its prosecution of the writ of error in the above entitled cause, to-wit:

1. The Supreme Court of the State of Wisconsin erred in holding that the ordinance of the City of Milwaukee, Wisconsin passed on the 8th day of November, 1915 requiring the plaintiff in error to do away with the bad condition of its railway zone on Center Street from Teutonia Avenue to Seventeenth Street by paving the same with standard asphalt upon a concrete foundation, all of the same kind,

character and specifications as that recently laid by the City of Milwaukee outside of the railway zone of the Railway Company therein was not void as conflicting with and violating Section 10 of Article 1 of the Constitution of the United States in that the City of
19 Milwaukee in and by said ordinance seeks to impair the obligation of the contracts of plaintiff in error.

2. The court erred in holding that the said ordinance of the City of Milwaukee, Wisconsin, was not void as conflicting with and violating Section 1 of Article 14 of the Amendments to the Constitution of the United States in that the City of Milwaukee, Wisconsin, in and by said ordinance seeks to deprive plaintiff in error of property without due process of law.

3. The said court erred in not holding that the ordinances of September 21, 1891 and January 2, 1900 as set out in the return and the amended return of the plaintiff in error to the alternative writ of mandamus constituted valid contracts wherein and whereby the plaintiff acquired a right not subject to alteration by the City of Milwaukee to keep the track zone on Center Street in good repair with the same material as the City of Milwaukee shall have last used to pave or repair said street previous to such repairs, except where, pursuant to the ordinance, some other material had been agreed upon; and in holding that no contract was made by the said ordinances, the obligation of which was impaired by the said ordinance of November 8, 1815 within the meaning of Section 10 of Article 1 of the Constitution of the United States.

4. The said court erred in not construing the contract embodied in the ordinances set forth in the return and the amended return of the plaintiff in error to the alternative writ of mandamus as a contract wherein and whereby the City of Milwaukee validly agreed with the plaintiff in error, that the plaintiff in error should
20 have the right to pave its railway zone on Center Street from Teutonia Avenue to Seventeenth Street with the same material as the City shall have last used to pave or repave the streets previous to such repair; and in holding that the obligation of said contract was not impaired by the ordinance of the City of Milwaukee passed November 8, 1915, within the meaning of Section 10 of Article 1 of the Constitution of the United States.

5. The said court erred in not holding that under the law of the State of Wisconsin as much law existed and was construed at the date of the enactment of the ordinances, in the return and amended return of the plaintiff in error to the alternative writ of mandamus set forth, the said City of Milwaukee was authorized and empowered to enter into a contract binding the said City of Milwaukee not to require the plaintiff in error to pave with any other material than that provided in the ordinance of January 2, 1900, and in not holding that such contract was in fact and law entered into by the passage of the said ordinance of January 2, 1900; and the said decision and judgment of the said court was in and of itself, in so far as the said court held that the City had no power to enter into such a contract and that no such contract was entered into, an impairment by the State of Wisconsin, acting by and through the said court, of the

obligation of the contract created by the said ordinances, inasmuch as by the said decision the said court denied the Constitutional right of plaintiff in error to the protection of its contract against impairment by making a new construction of the law of Wisconsin opposed to the construction of the law which was valid, in existence and in force at the time of the enactment of said ordinances,
21 and upon the faith of which the Company accepted and entered into the contract embodied therein.

6. The said court erred in holding that said ordinance of the City of Milwaukee, Wisconsin, passed November 8, 1915 constituted a proper exercise by the City of Milwaukee of the police power vested in said City and that therefore said ordinance did not impair the obligation of the contract of plaintiff in error and deprive plaintiff in error of property without due process of law in violation of Section 10 of Article 1 of the Constitution of the United States and in violation of Section 1 of Article 14 of the Amendments to the Constitution of the United States.

7. The said court erred in holding that the ordinance of the City of Milwaukee enacted November 8, 1915, was a reasonable rule and regulation under Section 1862, Statutes, because (*a*) said ordinance is not a rule or regulation within the meaning of that section; and (*b*) if the matters covered thereby be the subject of a rule or regulation the ordinance would be unreasonable because it impaired the obligation of the contract of the plaintiff in error in violation of Section 10 of Article 1 of the Constitution of the United States and deprived plaintiff in error of property without due process of law in violation of Section 1 of Article 14 of the Amendments to the Constitution of the United States.

8. The said court erred in holding that by compelling the plaintiff in error to pave under the ordinance passed by the Common Council of the City of Milwaukee on November 8, 1915, the earning capacity of the plaintiff in error would not be unreasonably reduced below a reasonable return on its investment, and in holding
22 that by compelling the plaintiff in error to pave under said ordinance the plaintiff in error would not be deprived of its property without due process of law, in violation of Section 1 of Article 14 of the Amendments to the Constitution of the United States.

9. The said court erred in affirming the judgment of the Circuit Court of Milwaukee County, State of Wisconsin allowing the City of Milwaukee to have a peremptory writ of mandamus commanding the plaintiff in error to put in good and thorough repair all that portion of Center Street extending from Teutonia Avenue to Seventeenth Street between lines drawn one foot outside of each of its outside rails therein by paving the same with an asphalt pavement upon a concrete foundation, all to be of the same kind, character and specifications as that used by the City of Milwaukee in paving said portion of said Center Street outside the street car zone therein mentioned, for the reason that the ordinance passed November 8, 1915 and set forth in the petition of the City of Milwaukee for the writ of mandamus was void in that the same was in conflict with and

violated Section 10 of Article 1 of the Constitution of the United States and Section 1 of Article 14 of the Amendments to the Constitution of the United States, as impairing the obligation of the contract of plaintiff in error and depriving the plaintiff in error of its property without due process of law.

10. The court erred in ordering judgment to be entered and in entering final judgment affirming the judgment of the Circuit Court of Milwaukee County, Wisconsin, directing that a peremptory writ of mandamus issue commanding the plaintiff in error to put
23 in good and thorough repair all that portion of Center Street extending from Teutonia Avenue to Seventeenth Street, and within the street car track zone, by paving the same with an asphalt pavement upon a concrete foundation of the same kind, character and specifications as that used by the City of Milwaukee in paving said portion of said Center Street outside of the street car track zone.

11. The said court erred in holding that plaintiff in error did not have any title, right, privilege or immunity under the Constitution of the United States which was violated and impaired by said ordinance passed November 8, 1915 by the City of Milwaukee, Wisconsin.

12. The Circuit Court of Milwaukee County of said State of Wisconsin erred in ordering judgment in favor of the City of Milwaukee and entering judgment whereby said Circuit Court directed that a peremptory writ of mandamus issue commanding the plaintiff in error to pave its street car track zone on Center Street between Teutonia Avenue and Seventeenth Street with asphalt upon a concrete foundation of the same kind, character and specifications as that used by the City of Milwaukee in paving the said street outside of the street car track zone, for the reason that said ordinance was invalid for each and every of the reasons and errors within assigned against the said final judgment of the Supreme Court of the State of Wisconsin.

For which errors the plaintiff in error, The Milwaukee Electric Railway & Light Company, prays that the final judgment of the Supreme Court of the State of Wisconsin, made and entered on the 23rd day of October 1917, be reversed by the Supreme Court of the United States, and the plaintiff in error, The Milwaukee
24 Electric Railway & Light Company, further prays that the said judgment of the Circuit Court for Milwaukee County, Wisconsin, be reversed by the Supreme Court of the United States because of errors hereinbefore assigned, and that said plaintiff in error may be restored to all things that it has lost by occasion thereof.

Dated this 20th day of November, 1917.

GEO. P. MILLER,

EDWIN S. MACK,

Attorneys for Plaintiff in Error, The Milwaukee Electric Railway & Light Company.

The aforesaid assignments of error were duly presented to me this 22d day of November, 1917, before allowing the writ of error in such case of even date.

[Seal Supreme Court of Wisconsin.]

JNO. B. WINSLOW,
Chief Justice of the Supreme Court of the State of Wisconsin.

25 [Endorsed:] State of Wisconsin. In Supreme Court. The Milwaukee Electric Railway & Light Company, Plaintiff in Error, vs. State of Wisconsin ex rel. City of Milwaukee, Defendant in Error. Assignments of Error. Original. Miller, Mack & Fairchild. Filed Nov. 22, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

26 STATE OF WISCONSIN:

Department of Insurance.

This is to certify that the Fidelity & Deposit Co. of Maryland of Baltimore, Maryland, has complied with all the provisions of law, and is authorized to transact the business of (7) fidelity or suretyship insurance in this State from the first day of March, 1917, until the twenty-eighth day of February, 1918, inclusive, unless its authority be sooner revoked.

Witness my hand and official seal, at Madison, Wisconsin, this first day of March, 1917.

[SEAL.] M. J. CLEARY,
Commissioner of Insurance.

No. 10.

I, F. W. Kubasta, Deputy Commissioner of Insurance of the State of Wisconsin, hereby certify that I have compared the foregoing copy with the original certificate of authority, issued to the Fidelity & Deposit Co. of Maryland of Baltimore, Md., and now on file and of record in my office and in my lawful custody, and that such copy is a true copy of said original and of the whole thereof.

Witness my hand and official seal at Madison, Wisconsin, this 11th day of May, A. D. 1917.

[SEAL.] F. W. KUBASTA,
Deputy Commissioner of Insurance.

Form 69.

27 STATE OF WISCONSIN:

In Supreme Court.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Plaintiff in Error,

vs.

STATE OF WISCONSIN ex Rel. CITY OF MILWAUKEE, Defendant in Error.

Bond on Writ of Error from the Supreme Court of the United States.

Know all men by these Presents that we, the Milwaukee Electric Railway & Light Company, as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto the above named City of Milwaukee in the sum of two hundred and fifty dollars ($250.00), to be paid to the said City of Milwaukee, for the payment of which well and truly to be made we bind ourselves, and each of us, and each of our representatives, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seal and dated this 20th day of November in the year of our Lord, One Thousand Nine Hundred and Seventeen.

Whereas, the above named The Milwaukee Electric Railway & Light Company seeks to prosecute a writ of error to the Supreme Court of the United States to reverse the judgment entered in
28 the above entitled suit by the Supreme Court of the State of Wisconsin;

Now, therefore, the condition of this obligation is such that if the above named The Milwaukee Electric Railway & Light Company shall diligently prosecute its said writ of error to effect and answer all damages and costs that may be adjudged, if it shall fail to make the plea good, then this obligation to be void, otherwise to remain in full force and effect.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY,
By S. B. WAY, *Vice-Pres.*

Attest:
F. J. BOEHM, *Asst. Secy.*

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By WM. M. WOLFF, *Attorney in Fact.*

[CORPORATE SEAL.] [CORPORATE SEAL.]

Signed, sealed and delivered in presence of:
H. M. WREN.
AGNES LEUTHOLD.
L. E. MOELLER.
R. H. CLAUS.

This bond approved by me this 22nd day of November, 1917.

[Seal Supreme Court of Wisconsin.]

JOHN B. WINSLOW,
Chief Justice of the Supreme Court of the State of Wisconsin.

The sufficiency and form of foregoing bond is satisfactory.

CLIFTON WILLIAMS,
Attorney for Defendant in Error.

29 [Endorsed:] Copy. State of Wisconsin. In Supreme Court. The Milwaukee Electric Railway & Light Company, Plaintiff in Error, vs. State of Wisconsin ex Rel. City of Milwaukee, Defendant in Error. Bond on writ of error from the Supreme Court of the United States. Copy. Miller, Mack & Fairchild. Filed Nov. 22, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

30 STATE OF WISCONSIN:

In Supreme Court.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Plaintiff in Error,

vs.

STATE OF WISCONSIN ex Rel. CITY OF MILWAUKEE, Defendant in Error.

I, Clifton Williams, City Attorney of the City of Milwaukee, Wisconsin, do hereby consent to The Milwaukee Electric Railway & Light Company giving a bond on the writ of error to the Supreme Court of the United States in the above entitled action in the sum of two hundred and fifty dollars ($250.00) with Maryland Casualty Company of Baltimore, Maryland, as surety, conditioned that The Milwaukee Electric Railway & Light Company shall diligently prosecute its writ of error to effect and answer all damages and costs that may be adjudged, if it shall fail to make good the plea, then the obligation to be void, otherwise to remain in full force and effect.

Dated at Milwaukee, this 13 day of November, 1917.

CLIFTON WILLIAMS,
City Attorney of Milwaukee, Wisconsin.

31 [Endorsed:] State of Wisconsin. In Supreme Court. The Milwaukee Electric Railway & Light Company, Plaintiff in Error, vs. State of Wisconsin ex Rel. City of Milwaukee, Defendant in Error. Consent of City Attorney. Original. Miller, Mack & Fairchild. Filed Nov. 22, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

32 STATE OF WISCONSIN:

In Supreme Court.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Plaintiff in Error,

vs.

STATE OF WISCONSIN ex Rel. CITY OF MILWAUKEE, Defendant in Error.

SUPREME COURT,
State of Wisconsin, ss:

I, Arthur McLeod, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that there was lodged with me as such clerk on the 22 day of November, 1917, in the matter of The Milwaukee Electric Railway & Light Company, plaintiff in error, against State of Wisconsin ex Rel. City of Milwaukee, defendant in error, the following:

The original bond, of which a copy is herewith set forth.

Three copies of the writ of error, as herein set forth, one for said defendant in error and one to file in my office.

In witness whereof I have hereunto set my hand and the seal of this court this 22nd day of November, 1917.

[Seal Supreme Court of Wisconsin.]

ARTHUR A. McLEOD,
Clerk of the Supreme Court of the State of Wisconsin.

33 [Endorsed:] State of Wisconsin. In Supreme Court. The Milwaukee Electric Railway & Light Company, Plaintiff in Error, vs. State of Wisconsin ex Rel. City of Milwaukee, Defendant in Error. Certificate of lodgment. Original. Miller, Mack & Fairchild. Filed Nov. 22, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

34 Supreme Court of the United States.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Plaintiff in Error,

vs.

STATE OF WISCONSIN ex Rel. CITY OF MILWAUKEE, Defendant in Error.

Milwaukee, Wisconsin,
November 22nd, 1917.

I, attorney of record for State of Wisconsin ex rel. City of Milwaukee and City of Milwaukee, defendant in error in the above

entitled case, hereby acknowledge due and personal service of the attached citation, and enter an appearance in the Supreme Court of the United States.

CLIFTON WILLIAMS,
Attorney for Defendant in Error.

35 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the State of Wisconsin ex Rel. City of Milwaukee and to the City of Milwaukee, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C. within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Wisconsin wherein The Milwaukee Electric Railway & Light Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. John B. Winslow, Chief Justice of the Supreme Court of the State of Wisconsin this 22d day of November in the year of our Lord One Thousand Nine Hundred and Seventeen.

JNO. B. WINSLOW,
Chief Justice of the Supreme Court of the State of Wisconsin.

Attest:

[Seal Supreme Court of Wisconsin.]

ARTHUR A. McLEOD,
Clerk of the Supreme Court of the State of Wisconsin.

36 [Endorsed:] In the Supreme Court of the United States. The Milwaukee Electric Railway & Light Company, Plaintiff in Error, vs. State of Wisconsin ex rel. City of Milwaukee, Defendant in Error. Citation and Proof of Service. Original. Miller, Mack & Fairchild. Filed Nov. 27, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

37 Supreme Court of the United States.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Plaintiff in Error,

vs.

STATE OF WISCONSIN ex Rel. CITY OF MILWAUKEE, Defendant in Error.

It is hereby stipulated and agreed by and between the parties to the above entitled action, by their respective attorneys, that the

transcript of the record on the writ of error from the Supreme Court of the United States to the Supreme Court of the State of Wisconsin in the above entitled action shall include all of the record in the said Supreme Court of the State of Wisconsin.

Dated this 23d day of November, 1917.

GEO. P. MILLER,
EDWIN S. MACK,
Attorneys for Plaintiff in Error.
CLIFTON WILLIAMS,
City Atty.,
Attorney for Defendant in Error.

38 [Endorsed:] United States Supreme Court. The Milwaukee Electric Railway & Light Company, Plaintiff in Error, vs. State of Wisconsin ex rel. City of Milwaukee, Defendant in Error. Stipulation. Original. Miller, Mack & Fairchild, Milwaukee. Filed Dec. 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

39 Pleas Before the Supreme Court of the State of Wisconsin, at a Term Thereof Begun and Held at the Capitol, in Madison, the Seat of Government of said State, on the Second Tuesday, to-wit: the 14th Day of August, A. D. 1917.

Present: Hon. John B. Winslow, Chief Justice; Hon. Roujet D. Marshall, Hon. Robert G. Siebecker, Hon. James C. Kerwin, Hon. Add J. Vinje, Hon. Marvin B. Rosenberry, Hon. Franz C. Eschweiler, Justices; Arthur A. McLeod, Clerk.

Be it remembered that heretofore, to-wit: on the 3rd day of July, in the Year of our Lord One Thousand Nine Hundred and Seventeen came into the office of the Clerk of the Supreme Court of the State of Wisconsin the Milwaukee Electric Railway & Light Company by its attorneys, and filed in said court its certain Notice of Appeal and Undertaking, according to the statute in such case made and provided and also the Return to such appeal, of the Clerk of the Circuit Court of Milwaukee County, in said State, in words and figures following, that is to say:

40 Filed Jun- 26, 1917. C. C. Maas, Clerk.

STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

47813.

STATE ex Rel. CITY OF MILWAUKEE, Relator,

vs.

THE MILWAUKEE ELECTRIC RAILWAY AND LIGHT COMPANY, Respondent.

(Center Street Paving Case.)

Please take notice that the defendant The Milwaukee Electric Railway & Light Company hereby appeals to the Supreme Court of the State of Wisconsin from the judgment entered in the above entitled action on the 8th day of June, 1917, and from the whole and each and every part thereof.

Dated June 26, 1917.

MILLER, MACK & FAIRCHILD,
Attorneys for Defendant The Milwaukee Electric Railway & Light Company.

To Clifton Williams, Esq., Attorney for Relator, and to C. C. Maas, Clerk of the Circuit Court, Milwaukee County.

Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

41 Filed Jun- 26, 1917. C. C. Maas, Clerk.

Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

#47813.

STATE ex Rel. CITY OF MILWAUKEE, Relator,

vs.

THE MILWAUKEE ELECTRIC RAILWAY AND LIGHT COMPANY, Respondent.

Whereas judgment was entered inthe above entitled cause on June 8, 1917, directing that a peremptory writ of mandamus issue

commanding the defendant, The Milwaukee Electric Railway and Light Company, to put in good and thorough repair all that portion of Center Street extending from Teutonia Avenue to Seventeenth Street between lines drawn one foot outside of each of its outside rails therein and by paving the same with an asphalt pavement upon a concrete foundation, and for costs in favor of the relator and against the defendant in the sum of fifty-seven and 51/100 dollars ($57.51), and said defendant, The Milwaukee Electric Railway & Light Company feeling *agreed* thereby intends to appeal therefrom to the Supreme Court of the State of Wisconsin;

Now, therefore, Fidelity and Deposit Company of Maryland, a corporation organized and existing under and by virtue of the laws of the State of Maryland, and duly authorized to do business
42 as a suretyship corporation in the state of Wisconsin, does hereby, pursuant to the statute in such case made and provided, and pursuant to the order fixing the terms of an undertaking staying the enforcement of said judgment, undertake that the appellant will pay all costs and damages which may be awarded against it on said appeal and will pay all damages which the city of Milwaukee may have sustained by the not doing of the particular act or thing directed to be done by the said judgment, not exceeding two hundred fifty dollars ($250.00).

Dated June 26, 1917.

[SEAL.] FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

By CHAS. H. OELWYGE, *Atty. in Fact.*

43 (Indorsements:) 47813. State of Wisconsin. Circuit Court, Milwaukee County. State ex Rel. City of Milwaukee, Relator, vs. The Milwaukee Electric Railway and Light Company, Respondent. (Center Street Paving Case.) Notice of Appeal and Undertaking. City of Milwaukee, Law Department. Received Jun- 26, 1917. Clifton Williams, City Attorney. Filed Jun- 26, 1917. C. C. Maas, Clerk. Original. Service of within notice and undertaking admitted June 26, 1917. C. C. Maas, Clerk, Circuit Court, Milwaukee County, Wisconsin. Miller, Mack & Fairchild, Milwaukee. Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

44 Filed Aug. 11, 1916. C. C. Maas, Clerk.

Filed Nov. 28, 1916. Arthur A. McLeod, Clerk of Supreme Court, Wis.

Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

STATE OF WISCONSIN ex Rel. CITY OF MILWAUKEE

vs.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY.

Petition for Writ of Mandamus.

Center Street.

To the Honorable the Circuit Court for the County of Milwaukee, State of Wisconsin:

The petition of the City of Milwaukee, the undersigned petitioner, respectfully alleges and shows to this Honorable Court, by Clifton Williams, its City Attorney, as follows:

1. That the City of Milwaukee is a municipal corporation organized and existing under and by virtue of the laws of the State of Wisconsin.

2. That The Milwaukee Electric Railway & Light Company is a corporation organized under and existing by virtue of the laws of the State of Wisconsin, and engaged in the business of carrying passengers for hire in the City of Milwaukee on various streets, among them being Center Street and extending from Seventeenth Street to Teutonia Avenue and elsewhere; that Center Street is an east and west street in the northerly portion of said city, and Seventeenth Street is a north and south street crossing said Center Street, and Teu-
45 tonia Avenue is a street running in a northwesterly and southeasterly direction, crossing said Center Street about six blocks east of the said Seventeenth Street, and that said Street Car Company operates its street car lines on said Center Street under a franchise granted to one of its predecessors in 1891.

3. That for several years last past the railway zone of the said Company in said portion of said street extending one foot outside of each of its outside rails has been composed of what is commonly called "macadam," consisting of gravel, crushed stone and dirt, and that said portion of said street above denominated, said zone, has for sometime been in a much worn out and dilapidated condition and

very dangerous for public travel on account of its unevenness and the fact that it at various places contained deep holes.

4. That about a year ago, the City of Milwaukee paved all that portion of Center Street extending from Seventeenth Street to Teutonia Avenue, and outside of the zone mentioned above herein, that is outside of lines drawn one foot outside of each of the outside rails of the Company in said street, with an asphalt pavement upon a concrete foundation.

5. That on November 8th, 1915, the Common Council of the City of Milwaukee duly passed an ordinance as follows:

"An Ordinance specifying the paving obligation of the Milwaukee Electric Railway and Light Company on Center street, from Holton Street to Fifth street, and from Teutonia avenue to Fond du Lac avenue.

The Mayor and Common Council of the City of Milwaukee do ordain as follows :

Section 1. All ordinances or parts of ordinances contravening the provisions of this ordinance are hereby so amended or modi-
46 fied as to give full force and effect to this ordinance.

Sec. 2. The Milwaukee Electric Railway and Light Company is hereby ordered and directed to do away with the bad condition of its railway zone on Center street, from the west line of Holton street to the east line of Fifth street, by paving the same with a creosoted wooden block pavement upon a concrete foundation from Holton street to Wall street, and from First street to Fifth street, and by paving the same with sandstone upon a concrete foundation from Wall street to First street, all of the same kind, character and specifications as that recently laid by the City of Milwaukee in the said street outside of the railway zone of the railway company therein.

Sec. 3. The said company is hereby ordered and directed to do away with the bad condition of its railway zone on Center street, from Teutonia avenue to Seventeenth street, by paving the same with standard asphalt upon a concrete foundation, all of the same kind, character and specifications as that recently laid by the City of Milwaukee outside of the railway zone of the railway company therein.

Sec. 4. The railway zone of the railway company on Center street in all the portions mentioned above is hereby defined to include all of that portion of said Center street extending one foot outside of each of the outside rails of the company therein.

Sec. 5. The said company shall begin the compliance of this ordinance within fifteen days after its passage and publication, and in case of its failure so to do the City Attorney is hereby authorized and directed to commence such proceedings as shall be necessary to compel the compliance herewith.

Sec. 6. This ordinance shall take effect and be in force from and after its passage and publication.

Immediately after the passage and publication of this ordinance said company shall proceed to lower its tracks in the sections of said

Center street above mentioned to the established grade of said street where they are above the established grade, and to raise the same to the established grade where they may be below the established grade, and to proceed with all possible haste to do away with the dangerous condition of said portions of said Center street because of the fact that the tracks do not comply with the established grade of said street and with the paving recently laid therein by the city."

47 6. That within the last week the said Company has started operation of reducing its track to the established grade of the said Center Street from said Teutonia Avenue to said Seventeenth Street and at the present time has its eastbound track partially removed for the purposes of excavation for the reduction of the said tracks to the grade of the said street and is about to remove its westbound track for the said purpose.

7. That the Vice-President of the said Company, Mr. R. B. Stearns, has informed the City Attorney in writing under date of July 24th, 1916 that the said Company intends to ignore the above quoted ordinance and intends to complete the operation of reducing its track to the grade of the said street and then to put the railway zone mentioned herein in good repair temporarily by paving the same with water-bound macadam.

8. That in several instances the said Company has used water-bound macadam of the kind that it threatens to use in the railway zone in question herein in the City of Milwaukee with very unsatisfactory results, the said water-bound macadam not being able to withstand the traffic on such streets as Center Street at this point, soon becoming full of holes and carrying out by the wheels of vehicles on to the asphalt.

Petitioner further alleges that it is physically impossible to make a water-tight bond between the water-bound macadam and the asphalt so as to prevent water from seeping through the water-bound macadam and under the asphalt, causing the asphalt to deteriorate in warm weather and to be lifted by freezing in cold weather.

Petitioner further alleges that the use of water-bound macadam in this railway zone under the heavy traffic of Center Street where the city has paved with asphalt outside of the said zone is
48 unreasonable, and that the requirement that the said Company should pave with asphalt in the said railway zone is a reasonable rule and regulation under the provisions of Section 1862 of the Wisconsin Statutes.

Wherefore, your petitioner prays for a writ commanding the said Company to pave the said railway zone with asphalt upon a concrete foundation, as required in the ordinance quoted herein, thereby prohibiting the said Company from using the water-bound macadam in the said zone which it threatens to use, and for such other relief as the court may deem proper in the premises.

CITY OF MILWAUKEE, *Petitioner,*
By CLIFTON WILLIAMS, *City Attorney.*

49 Filed Aug. 11, 1916. C. C. Maas, Clerk.

Filed Nov. 28, 1916. Arthur A. McLeod, Clerk of Supreme Court, Wis.

Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

STATE OF WISCONSIN,
Milwaukee County, ss:

Clifton Williams, being first duly sworn, on oath says that he is an officer of the above named petitioner, City of Milwaukee, to-wit, its City Attorney; that he makes this verification for and on behalf of said city, being thereunto duly authorized, and that the reason why this verification is not made by said City of Milwaukee is because said city is a municipal corporation; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein set forth on information and belief, and that as to those matters he believes it to be true.

CLIFTON WILLIAMS.

Subscribed and sworn to before me this 11 day of August, A. D. 1916.

E. L. McINTYRE,
Notary Public, Milwaukee County, Wisconsin.

My Commission expires Sep. 7, 1919.

50 (Indorsements:) Original. No. 47813. State of Wisconsin. Circuit Court, Milwaukee County. State of Wisconsin ex Rel. City of Milwaukee vs. T. M. E. R. & L. Co. Petition for Writ of Mandamus. Clifton Williams, City Attorney, City Hall, Milwaukee. Filed Aug. 11, 1916. C. C. Maas, Clerk. Filed Nov. 28, 1916. Arthur A. McLeod, Clerk of Supreme Court, Wis. Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

51 Filed Aug. 11, 1916. C. C. Maas, Clerk.

Filed Nov. 28, 1916. Arthur A. McLeod, Clerk of Supreme Court, Wis.

Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

STATE OF WISCONSIN ex Rel. CITY OF MILWAUKEE

vs.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY.

Upon the verified petition of the City of Milwaukee filed in the above entitled matter, and upon motion of Clifton Williams, City Attorney;

It is ordered, that an alternative writ issue out of and under the seal of the above entitled court commanding the said defendant Company to use asphalt pavement upon a concrete foundation, as required in the ordinance of November 8, 1915, in paving that portion of Center Street mentioned in the petition, and commanding said company to use the said pavement instead of water-bound macadam, which it threatens to use.

It is further ordered, that the writ be returnable at the opening of court at 10 A. M. on the 12th day of August, 1916.

Let a copy of the petition be served with the writ.

By the court:

F. C. ESCHWEILER,
Circuit Judge.

Dated August 11th, 1916.

52 (Indorsements:) Original. No. 47813. State of Wisconsin. Circuit Court, Milwaukee County. State of Wisconsin ex rel. City of Milwaukee, vs. T. M. E. R. & L. Co. Order for Writ. Clifton Williams, City Attorney, City Hall, Milwaukee. Service of a copy of within — admitted this — day of —— 191-. ——— ——— ——— ———, Attorneys for ——— ———. Filed Aug. 11, 1916. C. C. Maas, Clerk. Filed Nov. 28, 1916. Arthur A. McLeod, Clerk of Supreme Court, Wis. Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

53 T. M. E. R. & L. Co. Received Aug. 11, 1916. R. B. S.

Filed Sep. 2, 1916. C. C. Maas, Clerk.

Filed Nov. 28, 1916. Arthur A. McLeod, Clerk of Supreme Court, Wis.

Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

STATE OF WISCONSIN ex Rel. CITY OF MILWAUKEE
vs.
THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY.

Alternative Writ.

Center Street.

State of Wisconsin to the Milwaukee Electric Railway & Light Company, Greeting:

Whereas it appears to this court by verified petition of the City of Milwaukee on file in the office of the Clerk of said Court that there exists a duty upon your part, as alleged in said petition, which petition is in words and figures following:

54 Filed Sep. 2, 1916. C. C. Maas, Clerk.

Filed Nov. 28, 1916. Arthur A. McLeod, Clerk of Supreme Court, Wis.

Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

STATE OF WISCONSIN ex Rel. CITY OF MILWAUKEE
vs.
THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY.

Petition for Writ of Mandamus.

To the Honorable the Circuit Court for the County of Milwaukee, State of Wisconsin:

The petition of the City of Milwaukee, the undersigned petitioner, respectfully alleges and shows to this Honorable Court, by Clifton Williams, its City Attorney, as follows:

1. That the City of Milwaukee is a municipal corporation organized and existing under and by virtue of the laws of the State of Wisconsin.

2. That The Milwaukee Electric Railway & Light Company is a corporation organized under and existing by virtue of the laws of the State of Wisconsin, and engaged in the business of carrying passengers for hire in the City of Milwaukee on various streets, among them being Center Street and extending from Seventeenth Street to Teutonia Avenue and elsewhere; that Center Street is an east and west street in the northerly portion of said city, and Seventeenth Street is a north and south street crossing said Center Street, and Teutonia Avenue is a street running in a northwesterly and southeasterly direction, crossing said Center Street about six blocks east of the said Seventeenth Street, and that said Street Car Company operates its street car lines on said Center Street under a franchise granted to one of its predecessors in 1891.

3. That for several years last past the railway zone of the said Comuany in said portion of said Street extending one foot outside of each of its outside rails has been composed of what is commonly called "macadam," consisting of gravel, crushed stone and dirt, and that said portion of said street above denominated, said zone, has for some time been in a much worn out and dilapidated condition and very dangerous for public travel on account of its unevenness
55 and the fact that it at various places contained deep holes.

4. That about a year ago, the City of Milwaukee paved all that portion of Center Street extending from Seventeenth Street to Teutonia Avenue, and outside of the zone mentioned above herein, that is outside of lines drawn one foot outside of each of the outside rails of the Company in said street, with an asphalt pavement upon a concrete foundation.

5. That on November 8th, 1915, the Common Council of the City of Milwaukee duly passed an ordinance as follows:

"An Ordinance specifying the paving obligation of the Milwaukee Electric Railway and Light Company on Center Street from Holton Street to Fifth Street and from Teutonia Avenue to Fond du Lac Avenue.

The Mayor and Common Council of the City of Milwaukee do ordain as follows:

Section 1. All ordinances or parts of ordinances contravening the provisions of this ordinance are hereby so amended or modified as to give full force and effect to this ordinance.

Sec. 2. The Milwaukee Electric Railway and Light Company is hereby ordered and directed to do away with the bad condition of its railway zone on Center Street, from the west line of Holton Street to the east line of Fifth Street, by paving the same with a creosoted wooden block pavement upon a concrete foundation from Holton Street to Wall Street, and from First Street to Fifth Street, and by paving the same with sandstone upon a concrete foundation from Wall street to First Street, all of the same kind, character and speci-

fications as that recently laid by the City of Milwaukee in the said street outside of the railway zone of the railway company therein.

Sec. 3. The said company is hereby ordered and directed to do away with the bad condition of its railway zone on Center Street, from Teutonia Avenue to Seventeenth Street, by paving the same with standard asphalt upon a concrete foundation, all of the same kind, character and specifications as that recently laid by the City of Milwaukee outside of the railway zone of the railway company therein.

Sec. 4. The railway zone of the railway company on Center Street in all the portions mentioned above is hereby defined to include all of that portion of said Center Street extending one foot outside of each of the outside rails of the company therein.

Sec. 5. The said company shall begin the compliance of this ordinance within fifteen days after its passage and publication, and in case of its failure so to do the City Attorney is hereby authorized and directed to commence such proceedings as shall be necessary to compel the compliance herewith.

Sec. 6. This ordinance shall take effect and be in force from and after its passage and publication.

Immediately after the passage and publication of this ordinance said company shall proceed to lower its tracks in the sections of said Center Street above mentioned, to the established grade of said street where they are above the established grade, and to raise the same to the established grade where they may be below the established grade, and to proceed with all possible haste to do away with the dangerous condition of said portions of said Center Street because of the
156 fact that the tracks do not comply with the established grade of said street and with the paving recently laid therein by the city."

6. That within the last week the said Company has started operation of reducing its track to the established grade of the said Center Street from said Teutonia Avenue to said Seventeenth Street and at the present time has its eastbound track partially removed for the purposes of excavation for the reduction of the said tracks to the grade of the said street and is about to remove its westbound track for the said purpose.

7. That the Vice-President of the said Company, Mr. R. B. Stearns, has informed the City Attorney in writing under date of July 24th, 1916, that the said Company intends to ignore the above quoted ordinance and intends to complete the operation of reducing its track to the grade of the said street and then to put the railway zone mentioned herein in good repair temporarily by paving the same with water-bound macadam.

8. hat in several instances the said Company has used water-bound macadam of the kind that it threatens to use in the railway zone in question herein in the City of Milwaukee with very unsatisfactory results, the said water-bound macadam not being able to withstand the traffic on such streets as Center Street at this point,

soon becoming full of holes and carrying out by the wheels of vehicles onto the asphalt.

Petitioner further alleges that it is physically impossible to make a water-tight bond between the water-bound macadam and the asphalt so as to prevent water from seeping through the water-bound macadam and under the asphalt, causing the asphalt to deteriorate in warm weather and to be lifted by freezing in cold weather.

Petitioner further alleges that the use of water-bound macadam in this railway zone under the heavy traffic of Center Street where the city has paved with asphalt outside of the said zone is unreasonable, and that the requirement that the said Company should pave with asphalt in the said railway zone is a reasonable rule and regulation under the provisions of Section 1862 of the Wisconsin Statutes.

Wherefore, your petitioner prays for a writ commanding the said Company to pave the said railway zone with asphalt upon a concrete foundation, as required in the ordinance quoted herein, thereby prohibiting the said Company from using the water-bound macadam in the said zone which it threatens to use, and for such other relief as the court may deem proper in the premisse.

CITY OF MILWAUKEE,
Petitioner,

By CLIFTON WILLIAMS,
City Attorney.

57 and nevertheless you have unjustly refused to comply with the ordinance of November 8th, 1915, as appears to us by said verified petition.

Now, therefore, we being willing that speedy justice should be done in this behalf to it, the City of Milwaukee, do command and enjoin you that you pave Center street from Teutonia Avenue to Seventeenth Street, and one foot outside of each of the outside rails therein, with asphalt upon a concrete foundation, all of the same kind, character and specifications as that recently laid by the City in said portion of Center Street outside of the zone mentioned herein, and that you desist from paving the same with water-bound macadam, or that you show cause to the contrary before the Honorable Circuit Court for the County of Milwaukee at a regular term thereof to be held at the Courthouse in the City of Milwaukee before that branch thereof presided over by F. C. Eschweiler, at the opening of court at 10 A. M. on the 12th day of August, 1916, or as soon thereafter as counsel can be heard, and have you then and there this writ and make due return of your execution of the same.

Witness the Honorable F. C. Eschweiler, Judge of our Circuit Court, this 11th day of August, 1916.

[SEAL.]

C. C. MAAS, *Clerk,*
By THOW DALLY,
Deputy Clerk.

Directed to the Sheriff of Milwaukee County for service.

58 STATE OF WISCONSIN,
Milwaukee County, ss:

Clifton Williams, being first duly sworn, on oath says that he is an officer of the above named petitioner, City of Milwaukee, to-wit: its City Attorney; that he makes this verification for and on behalf of said city, being thereunto duly authorized, and that the reason why this verification is not made by said City of Milwaukee is because said city is a municipal corporation; that he has read the foregoing petition and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein set forth on information and belief, and that as to those matters he believes it to be true.

CLIFTON WILLIAMS.

Subscribed and sworn to before me this 11th day of August, A. D. 1916.

E. L. McINTYRE,
Notary Public, Milwaukee County, Wisconsin.

My commission expires Sep. 7, 1919.

59 (Indorsements:) Original. No. —. State of Wisconsin, Circuit Court, Milwaukee County. State of Wisconsin ex rel. City of Milwaukee vs. T. M. E. R. & L. Co. Alternative Writ. Clifton Williams, City Attorney, City Hall, Milwaukee. Service of a copy of within — admitted this — day of ——, 191-. ——— ———, ——— ———, Attorneys for —— ——. Served Aug. 11, 1916. Edmund T. Melms, Sheriff, per John Merz, Deputy Sheriff. Filed Nov. 28, 1916. Arthur A. McLeod, Clerk of Supreme Court, Wis. Filed Jul. 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

60 Filed Sep. 2, 1916. C. C. Maas, Clerk.

Filed Nov. 28, 1916. Arthur A. McLeod, Clerk of Supreme Court, Wis.

Filed Jul. 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

STATE OF WISCONSIN ex Rel. CITY OF MILWAUKEE, Relator,

vs.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Defendant.

Return to Alternative Writ of Mandamus.

The above named defendant, The Milwaukee Electric Railway & Light Company, does hereby make return to the alternative writ of

mandamus herein, which is hereto annexed, and for reason why said defendant has not done and cannot lawfully do the things therein commanded said defendant does respectfully represent and show to this Court:

1. Admits and alleges that the City of Milwaukee is a municipal corporation organized and existing under and by virtue of the laws of the State of Wisconsin.

*2. Admits and alleges that the defendant is a corporation organized and existing under and by the virtue of the laws of the State of Wisconsin and engaged in the business of carrying passengers for hire in the City of Milwaukee on various streets, among them being Center street extending from Seventeenth Street to Teutonia
61 Avenue and elsewhere; that Center Street is an east and west street in the northerly portion of said city; that Seventeenth Street is a north and south street crossing said Center Street; and that Teutonia Avenue is a street running in a northwesterly and southeasterly direction crossing said Center Street about six blocks east of said Seventeenth Street; and that this defendant operates its street car lines on said portion of said Center Street under a certain franchise granted to one of its predecessors and assignors, namely, Milwaukee Street Railway Company, on September 21, 1891, a true copy of which ordinance, marked Exhibit A is hereunto annexed and made a part hereof as fully as if the same were herein set forth in extenso.

3. Alleges that this defendant succeeded to all of the rights of said Milwaukee Street Railway Company under said ordinance prior to —, and on January 2, 1900, was operating its street car line on said portion of said Center Street pursuant thereto, and that on said last named date the Common Council of said City of Milwaukee passed an ordinance granting certain rights to this defendant, a true copy of which ordinance, marked Exhibit B, is hereunto annexed and made a part hereof as fully as if the same were herein set forth in extenso.

4. Admits and alleges that for several years prior to the
62 filing of the petition for mandamus herein that portion of said Center Street extending from Seventeenth Street to Teutonia Avenue lying between lines drawn parallel with and one foot outside of the outside rails of the defendant's tracks therein was composed and paved with macadam.

5. Admits and alleges that about one year prior to the filing of said petition the City of Milwaukee paved all that portion of Center Street extending from Seventeenth Street to Teutonia Avenue outside of the portion or zone described in paragraph 4 with an asphalt pavement on a concrete foundation; and alleges that during all of the times prior to the paving mentioned in this paragraph all of said Center Street extending from Seventeenth Street to Teutonia Avenue was composed of and paved with the same material mentioned in said paragraph 4.

6. Admits and alleges that on November 8, 1915, the Common Council of the City of Milwaukee in form passed the pretended

ordinance set forth in paragraph 5 of the petition for writ of mandamus herein.

7. Alleges that at the time that the alternative writ of mandamus herein was issued and served upon it this defendant had commenced the reconstruction of its tracks on said Center Street from Seventeenth Street to Teutonia Avenue; that its east-bound track
63 had been wholly removed for the purpose of excavation for the reduction to grade of said tracks and that about one-half of the same had been reconstructed to the grade of said street, and that it was about to remove its west-bound track for said purpose; and that it had informed the officers of said City of Milwaukee that it did not consider said pretended ordinance of November 8, 1915, to be valid or of any force or effect, that it intended to complete the operation of reducing its tracks to the grade of said street and then to put the zone described in the foregoing paragraph 4 in good repair with macadam, that being the same material which the said City had last used to pave or repave said space and the street previous thereto; and this defendant further alleges that it has since completed the operation of so reconstructing its tracks to the grade of said street and is now engaged in placing the said portion of said Center Street in the zone described in paragraph 4 in good repair and condition with the same material as the City last used to pave or repave said space previous thereto, no agreement having at any time been entered into between this defendant and the Board of Public Works of said City or the Commissioner of Public Works of said City for the use of any other material, and that the said work will be completed and said portion of said street in said zone placed in good repair and condition within about ten days.

8. Alleges that at the time of the passage of said pretended ordinance of November 8, 1915, and for a long time prior thereto,
64 the earnings of this defendant from its street railway system in the City of Milwaukee were considerably under six per cent (6%) of the value of the property used and useful for the conduct of said street railway system and were and are less than an adequate or reasonable return; that the imposition of the additional burden involved in the expenditures necessary to comply with the directions of said pretended ordinance is an unreasonable action on the part of said Common Council and that said pretended ordinance as a whole is unreasonable and oppressive; and that at the time of the attempted passage of said ordinance, said Common Council was and is without power to pass said pretended ordinance and that the same is wholly null and void.

9. That at all times after the zone mentioned in paragraph 4 hereof was constructed of or paved with macadam and at the time of said paving by said City with asphalt as above alleged and at all times thereafter, except during the operation of reconstructing and relaying the defendant's tracks therein, the same was by the defendant kept and maintained in good repair and condition with macadam, that being the same material as the City had last used to pave or repave the same and the street.

10. This defendant further denies each and every matter, allega-

tion and thing alleged or contained in the petition of said peti-
65 tioner, City of Milwaukee, praying for a writ of mandamus in the above entitled proceeding not hereinbefore expressly admitted.

All of which is respectfully submitted.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY,
By R. B. STEARNS, *Vice-President.*

MILLER, MACK & FAIRCHILD,
Attorneys for Defendant.

66 STATE OF WISCONSIN,
Milwaukee County, ss:

R. B. Stearns, being duly sworn, deposes and says that he is the Vice President of The Milwaukee Electric Railway & Light Company, the defendant above named, and makes this verification on its behalf, and is duly authorized so to do; that he has read the foregoing return and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein set forth on information and belief, and as to those matters he believes it to be true; that the reason he makes this verification is that the said defendant is a corporation and he is such officer thereof as aforesaid; that the source of his knowledge and information and the grounds of his belief are his connection with the affairs of said company as such officer, and the reports made to him by the employees of said defendant.

R. B. STEARNS.

Subscribed and sworn to before me this 1st day of September, 1916.

[SEAL.] P. W. KLABUNDE,
Notary Public, Milwaukee County, Wisconsin.

My commission expires Feb. 10, 1918.

67 EXHIBIT A.

An Ordinance to authorize the Milwaukee Street Railway Company, its successors and assigns, to extend its tracks on certain streets mentioned therein, and for other purposes.

The mayor and common council of the city of Milwaukee do ordain as follows:

Section 1. The Milwaukee Street Railway Company its successors and assigns, are hereby authorized to extend its present tracks at the corner of Center and Teutonia streets, along Center street, westerly to Seventeenth street, thence northerly on Seventeenth street to the Hopkins road (so-called); thence northwesterly on the Hopkins road to the city limits.

Section 2. This ordinance is passed on the condition and subject to the agreement upon the part of the Milwaukee Street Railway Company that it will surrender any and all rights which it may have to place its tracks upon Teutonia street, heretofore mentioned, from its intersection with Center street north to the city limits, and the building of the lines granted by this ordinance are accepted and agreed to on the part of the said Wilwaukee Street Railway Company as an acceptance of the conditions imposed in this section.

Passed September 21, 1891.

68 EXHIBIT B.

An Ordinance authorizing the Milwaukee Electric Railway & Light Company to construct, maintain and operate street railways in the city of Milwaukee over and along the streets, highways, bridges and viaducts named herein, and providing for a uniform and concurrent date for the termination of all franchises and right'-of-ways heretofore or hereby granted to said company, or to its predecessors and assigns, and providing for the rates of fare to be charged and for certain transfer privileges.

The mayor and common council of the city of Milwaukee do ordain as follows:

Section 1. There is hereby given and granted to The Milwaukee Electric Railway & Light company, hereinafter called the railway company, its successors and assigns, the right, permission and authority to lay, construct, maintain and operate a single or double track for street railways, for the carrying of passengers, with all necessary and convenient tracks, turnouts, sidetracks, connections, cross-overs and switches, and to erect and maintain necessary or convenient poles on those streets of the city of Milwaukee and in the manner and upon the conditions herein set forth.

Sec. 2. The poles of said railway company are to be placed or replaced according to a plan submitted to and approved by the board of public works; provided, however, that said board shall have the right to change the location of poles as indicated on the plan so submitted, and all poles to be placed or replaced according to the said approved plan and under the supervision and direction of the said board of public works. The track of the said railway shall be of the gauge of not more nor less than four feet eight and one-half inches, and shall not be elevated above nor depressed below the established grade of the street. It shall be laid with modern improved rails, as approved by the board of public works, and in such manner that carriages and other vehicles can easily and
69 freely cross said streets at any and all points and in any and all directions, without obstruction, and shall be laid as near the center of said streets and as near together as practicable. It shall be the duty of said railway company at all times to keep in good repair the roadway between the rails and for one foot on the outside of each rail as laid, and the space between the two inside rails of its double tracks with the same material as the

city shall have last used to pave or repave these spaces and the street previous to such repairs, unless the said railway company and the board of public works of said city shall agree upon some other material, and said company shall then use the material agreed upon. Said railway company shall operate thereon street railway cars and carriages by means of power produced by electricity conducted upon wires suspended over and above its tracks, or such other power as may be agreed upon between said city and the said railway company, its successors and assigns.

Sec. 3. All rights reserved or secured to said city by and under all ordinances now in force or the laws of Wisconsin relating to regulating the speed and headway of cars, the time that cars shall be operated each day, the laying of tracks, stringing of wires, and the use and operation of all cars and tracks and everything connected with the exercise of the rights hereby or heretofore granted to said railway company and its predecessors, are hereby reserved to said city the same as though this ordinance had not been passed, and the same shall extend and apply to all franchises hereby granted except as herein otherwise expressly provided.

Sec. 4. There is hereby given and granted to the said railway company, in addition to the streets, avenues, viaducts, subways, and bridges now occupied and used by said railway company in said city for the purpose and use set forth in section 1 of this ordinance, and for the use and in the manner set forth in this ordinance, these further rights, to-wit:

1. On First avenue, commencing at the city limits on the south, thence north on said First avenue to the First avenue viaduct, thence on said viaduct to First avenue bridge, thence over said bridge to First avenue and sixth street bridge, thence on and across said Sixth street bridge and viaduct and their approaches to Sixth street, thence on Sixth street from and over Sixth street viaduct to Clybourn street; also on Sixth street from Grand avenue north to State street; and in case said company, its successors or assigns, shall not have the said line completed and in full operation within two years from and after the passage and acceptance of this ordinance, then the above license and grant shall be null and void.

2. Commencing at the intersection of Windlake avenue and Eighth avenue, thence south on Eighth avenue to the city limits.

3. Commencing at the north terminus of Western avenue, thence southerly along said Western avenue to the southern terminus thereof, and on any extension of said avenue hereafter made within the limits of said city.

4. Commencing at the intersection of Western avenue and Locust street, thence easterly on said Locust street to Folsom street bridge, so-called, thence over and across said bridge and its approaches to Folsom street, thence easterly on said Folsom street to Downer avenue.

5. Beginning at the northerly limits of said city on Maryland avenue, thence south on Maryland avenue to Park place, thence west on Park place to Oakland avenue, thence south on Oakland

avenue to North avenue; and on Brady street from Warren avenue to Farwell avenue.

71 6. On the west side of River street from the tracks of said railway company on Oneida street north to the north line of the lots and property owned by said railway company and now used for its power house; and on Wisconsin street from Marshall street to the end of said street.

7. On Second street from Sycamore street south to the alley running east and west through block 75, in the Fourth ward, thence west on said alley to Third street; and the said railway company is authorized to make all necessary switches and connections from the lines on Sycamore street, Second street and Third street into the car station to be erected upon said block 75.

8. Commencing at the northerly limits of said city on Humboldt avenue, thence south on said Humboldt avenue to Concordia avenue, thence west on Concordia avenue to Holton street, and on Holton street from Chambers street north to the northerly limits of said city.

9. Commencing at the intersection of Harmon and Holton streets, thence south on Holton street to the Holton street viaduct, so-called, thence south over and across said viaduct and bridge and the approaches thereto to Van Buren street, thence south on Van Buren street to Brady street; provided, however, that in case said railway company shall construct its line over and across said Holton street viaduct, then and in that case all rights heretofore granted to said railway company or its predecessors for the construction of a line of railway on Harmon street from Holton street to Island avenue and on Island avenue from Harmon street south to the Pleasant street bridge, so-called, and across said Pleasant street bridge to North Water street, shall cease and determine, and said railway company shall remove its tracks from said street and bridge immediately upon the operation of its railway over said Holton street viaduct, and replace said streets and bridge in as good condition as the remaining portions of said streets and bridge,

72 and to the satisfaction of the board of public works of said city.

10. Commencing at the intersection of Twelfth and Burleigh streets, thence west on Burleigh street to Teutonia avenue, thence in a northerly and northwesterly direction on said Teutonia avenue to the city limits.

11. On North avenue from its intersection with Fond du Lac avenue west to the city limits, and on North avenue from Farwell avenue east to the west line of Lake avenue.

Provided, however, that the said railway company shall widen the roadway of said First avenue three feet on each side from the viaduct south to the intersection of Mitchell street, at its sole cost and expenses. And provided further, that where the balance of the roadway of said First avenue south of Mitchell street, and that of Folsom place, in the Eighteenth ward, is less than forty feet in width between the curb lines, and the roadways of said streets shall be widened by order of the common council upon petition or otherwise, the said work shall be done at the sole cost and expenses of said

railway company upon so much of said street as shall be occupied by the tracks of the said company.

Provided, however, that said railway company shall not run or operate any car or carriages on or over any viaduct, bridge or approaches thereto on which or over which it does not now operate its cars or carriages until it shall *of* its own cost, under the direction of the board of public works and city engineer of said city, widen or strengthen or both widen and strengthen the viaduct, bridge and approaches thereto as the operation of street cars and the safety of public travel may require, and as shall be determined by said board of public works and city engineer; provided, however, that all necessary approaches to said Sixth street viaduct shall be built and
73 maintained by said railway company at its own proper cost and charge; and in case the widening and strengthening of said viaduct shall cause any additional expense in the maintenance thereof, which now by law is required to be done by the Chicago, Milwaukee & St. Paul Railway company, and it shall be determined by any court having jurisdiction thereof that the whole or any part of the expense of such maintenance shall not be chargeable to said Chicago, Milwaukee & St. Paul Railway company, then and in that case the expense of maintaining and keeping in repair said Sixth street viaduct and the approaches thereto which shall not be chargeable to said Chicago, Milwaukee & St. Paul Railway company shall be borne by said railway company; it being the intent and understanding of this provision and condition that under no circumstances shall said city become liable for any other or further expenses in the maintenance and repair of said viaduct and the approaches thereto than are now provided for by an ordinance passed April 15th, 1878; and in case the said viaduct or any approach thereto shall thereafter break or become through any means unsafe for travel, or the operation of cars thereon, the same shall be promptly repaired to the satisfaction of said board of public works and city engineer by said railway company within a reasonable time fixed by the said engineer, and under his direction, and if the said railway company shall fail or neglect to fix or repair the same within such reasonable time, then the said city engineer and board of public works shall have the right to fix or repair the same at the charge and expense of the said railway company.

Provided, further, that in case the widening and strengthening of said First avenue viaduct, together with the approaches thereto, shall cause any additional expense in the maintenance thereof, which now by law is required to be done by the Chicago, Milwaukee & St. Paul Railway company, and it shall be determined by any court having jurisdiction thereof that the whole or any part of the expense of such maintenance shall not be chargeable to said Chicago, Mil-
74 waukee & St. Paul Railway company, then and in that case all the expenses of keeping in repair said First avenue viaduct and the approaches thereto which shall not be chargeable to said Chicago, Milwaukee & St. Paul Railway company shall be borne by the said railway company; it being the intent and understanding of this provision and condition that under no circumstances shall said

city become liable for any other or further expense in the maintenance and repair of said viaduct and the approaches thereto than are now provided for by a resolution passed August 3, 1885; and in case said viaduct and approaches thereto shall thereafter break or become through any means unsafe for travel or the operation of cars thereon, the same shall promptly be repaired to the satisfaction of said board of public works and city engineer by the said railway company within a reasonable time fixed by said city engineer and under his direction, and if said railway company shall fail or neglect to fix or repair the same within a reasonable time fixed by the said engineer, then the said work may be done by said board of public works and city engineer at the cost and expense of said railway company. Provided, further, that the said railway company shall not be required to widen the approaches to said Holton street viaduct, but all other provisions hereof shall extend and apply to said Holton street viaduct.

Provided, further, that in case of the extension of the city limits in the future, then said railway company is hereby authorized and obligated to make extension of any of its lines now or hereafter, reaching the city limits as they now exist to the said city limits when so extended, and in case said railway company shall refuse or neglect to so extend its lines on its own motion, then the common council of said city shall by resolutoin duly adopted order and direct said railway company to extend its lines to the city limits within such time as may be specified in such resolution, and said company shall comply therewith. And said railway company shall extend its tracks over any and all such streets of said city as the common council shall at any time by ordinance direct, but shall not be obliged to so extend its tracks unless there is a reasonable necessity therefor for the convenience of public travel; and when any such extension shall be made, all and singular the provisions of this ordinance relating to the operation thereof shall apply the same as though the provisions of this ordinance were made a part of the ordinance requiring such extension. Provided, however, that said railway company shall not be compelled to extend its lines from any of its terminal points to the city limits except over and along the street or avenue upon which such terminus is located, and in no case shall said railway company be compelled to extend its lines unless the streets or avenues over which such extension is to be made shall first have been made to the established grade.

Sec. 5. All the rights, privileges and franchises conferred by this ordinance shall be for and during the term commencing at the passage and publication of this ordinance and acceptance thereof and ending Dec. 31, 1934; and it is further expressly provided and agreed to by said railway company that all rights, privileges and franchises heretofore conferred upon the said company and its predecessors or companies of which it is the successors or assignee, shall be extended to and shall expire on Dec. 31, 1934; and any and all ordinances or franchises conferring rights upon said railway company or its predecessors of which it is the successor or assign, and which are without date of termination or expiration, shall expire on Dec. 31, 1934. If said railway company now owns or shall here-

after acquire or own any street railway lying beyond the present corporate limits of said city, and if the said corporate limits shall at any time be extended or the territory within which the said railways lie shall be annexed to said city and made a part thereof, then all such franchises of said railway company within such corporate limits shall expire on Dec. 31, 1934; it being the intention
76 that the franchises of all street railways owned and operated by the said railway company, within the corporate limits of said city as such limits shall exist on Dec. 31, 1934, shall expire on that day.

Sec. 6. After the passage, publication and acceptance of this ordinance by said railway company, the rate of fare for one continuous passage upon the lines of railway within said city limits of said city owned and operated by said railway company constructed under any franchise herein, heretofore or hereafter granted to said railway company or its predecessors, successors or assigns, as the case may be, shall be not to exceed five cents for a single fare, except for children under ten years of age the rate of fare shall be three cents for one child and five cents for two children, and infants under three years of age free. Except where cars or carriages shall be chartered at a special price, which fare shall entitle each passenger, upon demand made at the time of payment of fare, to one transfer at established points of transfer to any connecting or cross line of said railway company, for passage within said city, and convenient points of transfer shall be maintained and such additional points of transfer established as will carry out the full intent and purpose of this ordinance to maintain and extend the transfer system now in force upon the lines of said railway company at the present standard of convenience for the people of said city. Each transfer ticket shall be good only for the passenger to whom it is issued, and for a continuous trip in the direction specified upon the transfer so given, and upon the first car leaving the transfer intersection after the time designated on such transfer.

Provided, however, that after the acceptance of the terms of this ordinance the railway company shall, on demand made at its office in said city, or to the conductors on its cars operated on its lines within the corporate limits of said city, sell tickets in packages of twenty-five for one dollar or six for twenty-five cents, each of which tickets shall entitle the holder thereof to use the same upon
77 the cars of said railway company only between the hours of 5:30 o'clock and 8:00 o'clock in the morning and between the hours of 5:00 o'clock and 7:00 o'clock, central standard time, in the afternoon of each day until Jan. 1, 1905, and shall also entitle the holder to the same privileges as are or may be accorded to passengers paying a cash fare of five cents; and the said railway company shall, from and after Jan. 1, 1905, continue the sale of tickets in packages at the price aforesaid until Dec. 31, 1934, each to be good at all hours of the day, with same privileges as are or may be accorded to passengers paying a single cash fare of five cents.

Provided further, that the said railway company, its successors and assigns shall keep in a conspicuous place in their cars for the con-

venience of passengers a timepiece, to be regulated by central standard time.

Sec. 7. All rights, privileges, grants and franchises heretofore granted by said city to said railway company and the several corporations or parties from or through whom it has acquired, the same are hereby confirmed and granted to said railway company, its successors and assigns, except as herein modified or changed.

Sec. 8. In consideration of the rights and privileges hereby granted to said railway company, the said railway company shall at all times furnish to said city electric power necessary and sufficient to swing and operate all draw bridges now or hereafter maintained by said city and crossed by said railway company, and said company shall furnish and provide all necessary connections, conductors, circuits and everything whatsoever required to connect all such bridges with the power plant or plants maintained by said railway company, so that the electric power can be thereby properly and safely transmitted and applied.

Sec. 9. Whenever the said city shall determine to pave or repave any street upon which street car tracks are or shall be situate,
78 the board of public works shall give notice thereof to said railway company, and thereupon said railway company shall immediately make all such repairs, connections, conduits and improvements as it shall then deem necessary for the use and operation of its tracks and railway; after any such street shall be paved by said city, the pavements thereon and the pavements upon any and all streets heretofore paved by said city shall not be opened or disturbed by said railway company for any purpose whatsoever, except by permission in writing therefor signed by the mayor and the members of the said board of public works. And whenever any such permit shall be given the city engineer shall promptly give plans and specifications for opening and closing the pavement, and said railway company shall do such work according to such plans and specifications and under the supervision of said board of public works and city engineer and to their satisfaction, and said board shall have power to employ necessary and competent inspector or inspectors to actively superintend the work, and his compensation shall be paid by said railway company; and if said railway company shall fail or neglect or refuse to properly replace or repair any pavement so opened the city shall have the right to replace or repair the same by and under the direction of said board of public works, and said railway company shall pay the actual cost and expense thereof.

Sec. 10. The provisions of all ordinances now existing so far as the same or any or either of them relate to the use and operation of said railways, such as the removal of snow and ice therefrom, the joint use of tracks by other companies or persons, the occupation and use of streets, bridges and public places, and the repairing, replacing, strengthening and maintaining the same, the gauge, grade and elevation of tracks and the manner of constructing the same shall not be construed or deemed to be repealed hereby, but shall be and remain in force with the same effect as though this ordinance had not been passed.

79 Sec. 11. In consideration of the rights and privileges hereby granted, said railway company shall at all times carry and transport upon any and all of its cars (except on special or chartered cars) operated upon said railways, all members of the police, fire and health departments of said city when in uniform, and all detectives of the police department of said city; and the rights and privileges hereby granted shall be considered to be prepayment by said city of all fares of all such members and officers of said departments.

Sec. 12. Whenever the words "railway company" are used in this ordinance it shall be deemed to mean The Milwaukee Electric Railway & Light company and its successors and assigns; and whenever the word "city" or "said city" are used herein it shall be deemed to mean the city of Milwaukee as presently organized and all territory included within any and all extensions of the limits of said city hereafter made during the life of the rights hereby granted or confirmed.

Sec. 13. Before said railway Company shall exercise any of the rights, privileges or franchises provided for in this ordinance, it shall file with the city clerk of said city its written acceptance of and agreement to all of the terms and conditions contained in this ordinance, and also a list of all the transfer points now established by said railway company within said city; and in no event shall this ordinance or any provisions thereof take effect until such acceptance and agreement is filed; and if said railway company shall fail, neglect or refuse to file the same as herein required, within thirty days after the passage and publication hereof, then this ordinance and all and singular its provisions shall stand for naught, the same as though it had never been passed.

Sec. 14. This ordinance shall take effect and be in force from and after its passage and publication.

Passed January 2, 1900.

80 (Indorsements:) 47813. State of Wisconsin, Circuit Court, Milwaukee County. State of Wisconsin ex Rel. City of Milwaukee, Petitioner, vs. The Milwaukee Electric Railway & Light Company, Defendant. Return to Alternative Writ of Mandamus. Original. City of Milwaukee, Law Department. Received Sep. 1, 1916. Clifton Williams, City Attorney. Filed Sep. 2, 1916. C. C. Maas, Clerk. Miller, Mack & Fairchild, Milwaukee. Filed Nov. 28, 1916. Arthur A. McLeod, Clerk of Supreme Court, Wis. Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

81 Filed Sep. 20, 1916. C. C. Maas, Clerk.

Filed Nov. 28, 1916. Arthur A. McLeod, Clerk of Supreme Court, Wis.

Filed Jul-. 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

STATE OF WISCONSIN ex Rel. CITY OF MILWAUKEE, Petitioner,

vs.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Defendant.

(Center Street Paving.)

Notice of Argument of Demurrer.

To Messrs. Miller, Mack & Fairchild, Attorneys for Defendant:

Please Take Notice, that the annexed demurrer to the return in the above entitled matter will be called up for argument before that branch of the Circuit Court of Milwaukee County presided over by the Honorable Oscar M. Fritz, at his court room on the Third Floor of the County Court House, at the opening of court on the 25th day of September, 1916, or as soon thereafter as counsel can be heard.

Dated September 18th, 1916.

CLIFTON WILLIAMS,
City Attorney.

82 STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

STATE OF WISCONSIN ex Rel. CITY OF MILWAUKEE, Petitioner,

vs.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Defendant.

(Center Street Paving.)

Demurrer to Return.

Comes now City of Milwaukee, petitioner in the above entitled action, by its City Attorney, Clifton Williams, and demurs to the return of the defendant to the alternative writ on the ground that

the said return shows on its face that it does not state facts sufficient to constitute a defense to the alternative writ.

Dated September 18, 1916.

CITY OF MILWAUKEE,
Petitioner,
By CLIFTON WILLIAMS,
City Attorney.

83 (Indorsements:) Original. No. 47813. State of Wisconsin, Circuit Court, Milwaukee County. State of Wisconsin ex Rel. City of Milwaukee, Petitioner, vs. T. M. E. R. & L. Co., Defendant. (Center Street Paving.) Notice of Argument and Demurrer to Return. Clifton Williams, City Attorney, City Hall, Milwaukee. Received Sep. 18, 1916. Miller, Mack & Fairchild. Filed Sep. 20, 1916. C. C. Maas, Clerk. Filed Nov. 28, 1916. Arthur A. McLeod, Clerk of Supreme Court, Wis. Filed Jul- 3, 1917, Arthur A. McLeod, Clerk of Supreme Court, Wis.

84 Filed 2 Sep. 30, 1916, 2. C. C. Maas, Clerk.

Filed Nov. 28, 1916. Arthur A. McLeod, Clerk of Supreme Court, Wis.

Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

STATE OF WISCONSIN ex Rel. CITY OF MILWAUKEE, Petitioner,

v.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Defendant.

Amendment to Return to Alternative Writ of Mandamus.

The above named defendant, The Milwaukee Electric Railway & Light Company, as an amendment to its return to the alternative writ of mandamus heretofore filed herein, and for additional reason why said defendant has not done and cannot lawfully do the things therein commanded, said defendants does respectfully represent and show to this court:

Defendant alleges that after the passage and adoption of said ordinance of January 2, 1900, various franchises were duly granted from time to time by the Common Council of said City giving to the defendant the right to lay, construct, operate and maintain street railway tracks in a large number of streets and avenues in said City in addition to those mentioned in said ordinance of January 2, 1900, which various franchises provided that the rights thereby

granted should be upon the same terms and conditions set forth in said ordinance of January 2, 1900, that various extensions of the limits of said City were made from time to time by virtue of which, under said ordinance of January 2, 1900, the defendant was authorized and obligated to extend many of its existing lines and to operate the same upon the terms and conditions of said ordinance; that
85 from time to time thereafter a large number of streets and avenues on which the defendant was operating under and pursuant to said ordinance of January 2, 1900, and said franchises thereafter from time to time granted, were paved, repaved, improved and reconstructed, and that at all times after the passage of said ordinance the said City and this defendant construed the provisions thereof, and particularly section 2 thereof, as requiring the defendant to keep the roadway in the spaces described in section 2 of said ordinance in good repair with the same material which had last been used by said City to pave or repave those spaces, except in cases where this defendant and the Board of Public Works of said City, or the Commissioner of Public Works of said City, upon whom the duties of said Board now devolve, had agreed upon some other material, and as not requiring this defendant to pave or repave or to construct a new pavement in said spaces; that at some time during the year 1912 the said City for the first time indicated that it would no longer abide by such practical construction and that at no time prior to the year 1912 did said City, after the passage and adoption of said ordinance, demand of this defendant that it lay or construct any pavement or any new pavement in the spaces hereinbefore referred to on any street on which it operates under said ordinance of January 2, 1900, or under ordinances incorporating the terms and conditions thereof relative to roadway repairs, or that it keep or maintain the roadway in said spaces on any of said streets in repair with any material differing from that which had last been used therein by said City.

All of which is respectfully submitted.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY,
By R. B. STEARNS, *Vice President.*

MILLER, MACK & FAIRCHILD,
Attorneys for Defendant.

86 STATE OF WISCONSIN,
Milwaukee County, ss:

R. B. Stearns, being duly sworn, deposes and says that he is the Vice President of The Milwaukee Electric Railway & Light Company, the defendant above named, and makes this verification on its behalf, and is duly authorized so to do; that he has read the foregoing amendment to its return heretofore filed and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein set forth on information and belief, and as to those matters he believes it to be true; that the reason he makes this

verification is that the said defendant is a corporation and he is such officer thereof as aforesaid; that the source of his knowledge and information and the grounds of his belief are his connection with the affairs of said company as such officer, and the reports made to him by the employees of said defendant.

R. B. STEARNS.

Subscribed and sworn to before me this 21st day of September, A. D. 1916.

[SEAL.] E. L. OLSEN,
Notary Public, Milwaukee County, Wisconsin.

My commission expires July 4, 1920.

87 (Indorsements:) 47813. State of Wisconsin. Circuit Court, Milwaukee County. State of Wisconsin ex Rel. City of Milwaukee, Petitioner, vs. The Milwaukee Electric Railway & Light Company, Defendant. Amendment to Return to Alternative Writ of Mandamus. Original. Miller, Mack & Fairchild, Milwaukee. Filed 2 Sept. 30, 1916, 2. C. C. Maas, Clerk. Filed Nov. 28, 1916. Arthur A. McLeod, Clerk of Supreme Court, Wis. Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

88 Filed 2 Oct. 28, 1916, 2. C. C. Maas, Clerk.

Filed Nov. 28, 1916. Arthur A. McLeod, Clerk of Supreme Court, Wis.

Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

Circuit Court, Milwaukee County, Branch No. 2.

No. 47813.

STATE ex Rel. CITY OF MILWAUKEE

vs.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

Decision.

Upon the facts alleged and admitted in the return, it appears that the respondent's obligations for repairs of the space between the rails and one foot on the outside of each rail, along Center Street from Teutonia Avenue to Seventeenth Street, are prescribed by the provisions of Sec. 2 of the blanket franchise of January 2, 1900, and the regulatory provisions of the ordinance passed by the common council on Nov. 8, 1915, in the exercise of its powers under Sec. 1862 Wis. Statutes. The obligations imposed by those or-

dinances are not impaired by any other fact alleged in the return.

In view of the decisions in State ex rel. Milwaukee vs. T. M. E. R. & L. Co. 151 Wis. 520; Madison vs. Southern Wis. R. Co. 156 Wis. 352; Southern Wis. R. Co. vs. Madison, U. S. Supreme Court filed March 20th, 1916; State ex rel. Milwaukee vs. T. M. E. R. & L. Co., 157 Wis. 121, those obligations must be considered of such nature as to entitle petitioner to the relief sought in this proceeding.

Accordingly, an order, with the usual terms and conditions, may be entered sustaining petitioner's demurrer to the return.

Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

89 (Indorsements:) No. 47813. Circuit Court, Milwaukee County. State ex Rel. City of Milwaukee vs. T. M. E. R. & L. Co. Decision. Filed 2 Oct. 28, 1916, 2. C. C. Maas, Clerk. Filed Nov. 28, 1916. Arthur A. McLeod, Clerk of Supreme Court, Wis. Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

90 Filed 2 Nov. 8, 1916, 2. C. C. Maas, Clerk.

Filed Nov. 28, 1916. Arthur A. McLeod, Clerk of Supreme Court, Wis.

Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

First National Bank Building.

Milwaukee, November 8, 1916.

Miller, Mack & Fairchild—
Geo. P. Miller.
Edwin S. Mack.
Arthur W. Fairchild.
J. Gilbert Hardgrove.

Claude J. Hendricks.
B. Vandervelde.
Walter S. Bartlett.
Frederick R. Wahl.

Hon. Oscar M. Fritz, Circuit Judge, Milwaukee, Wis.

DEAR SIR:

Center Street Paving Case—No. 47813.

We herewith hand you amended return to alternative writ of mandamus together with letter from the City Attorney consenting

to the filing of the same and consenting that when an order is made it shall be made as an order directed to the demurrer thereto. We hereby consent that the demurrer shall stand as a demurrer to the amended return. We call attention particularly to paragraphs nine and ten setting forth practical construction and raising the constitutional questions discussed in our brief heretofore filed. We beg leave to submit the matter for your decision upon the arguments already made. We are mailing a copy of this letter to the City Attorney.

Yours very truly,

MILLER, MACK & FAIRCHILD.

91 Filed 2 Nov. 8, 1916, 2. C. C. Maas, Clerk.

Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

CITY OF MILWAUKEE:

Office of City Attorney.

Nov. 6th, 1916.

Messrs. Miller, Mack & Fairchild (Attention Mr. Hardgrove) City.

GENTLEMEN: I have received a copy of your proposed amended return to the alternative writ of mandamus in the Center Street paving case. If there is anything in it that would change the result on the demurrer to the first return, I do not care to waste any time on an order sustaining the demurrer to the first return. However, I am unable to find anything in your amended return which I think would justify the Circuit Court in changing its decision. I therefore make the proposition that you file the amended return, using this letter as a consent therefor, and if you do not care to argue the proposition further, either signify to me or to Judge Fritz your decision in that regard, and I will suggest that he sign an order sustaining the demurrer to the return and amended return.

Yours very truly,

CLIFTON WILLIAMS,
City Attorney.

(M. W.)

92 (Indorsements:) Filed 2 Nov. 8, 1916 2. C. C. Maas, Clerk. Filed Nov. 28, 1916. Arthur A. McLeod, Clerk of Supreme Court, Wis. Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

93 Filed 2 Nov. 8, 1916, 2. C. C. Maas, Clerk.

Filed Nov. 28, 1916. Arthur A. McLeod, Clerk of Supreme Court, Wis.

Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

#47813.

STATE OF WISCONSIN ex Rel. CITY OF MILWAUKEE, Petitioner,

v.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Defendant.

Amended Return to Alternative Writ of Mandamus.

The above named defendant, The Milwaukee Electric Railway & Light Company, does hereby make its amended return to the alternative writ of mandamus on file herein, and for reason why said defendant has not done and cannot lawfully do the things therein commanded said defendant does respectfully represent and show to this Court:

1. Admits and alleges that the City of Milwaukee is a municipal corporation organized and existing under and by virtue of the laws of the State of Wisconsin.

2. Admits and alleges that the defendant is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin and engaged in the business of carrying passengers for hire in the City of Milwaukee on various streets, among them being Center Street extending from Seventeenth Street to Teutonia Avenue and elsewhere; that Center Street is an east and west street in the northerly portion of said City; that Seventeenth Street is a north and south street crossing said Center Street; and that Teutonia Avenue is a street running in a northwesterly and southeasterly direction crossing said Center Street about six blocks east of said Seventeenth Street; and that this defendant operates its street car lines on said portion of said Center Street under a certain franchise granted
94 to one of its predecessors and assignors, namely, Milwaukee Street Railway Company, on September 21, 1891 (a true copy of which ordinance, marked Exhibit A, is hereunto annexed and made a part hereof as fully as if the same were herein set forth in extenso) as amended by the ordinance of January 2, 1900 hereinafter mentioned.

3. Alleges that this defendant succeeded to all of the rights of

said Milwaukee Street Railway Company under said ordinance of September 21, 1891, prior to and on January 2, 1900 was operating its street car lines on said portion of said Center Street pursuant thereto, and that on said last named date the Common Council of said City of Milwaukee passed an ordinance granting certain rights to this defendant, a true copy of which ordinance, marked Exhibit B, is hereunto annexed and made a part hereof as fully as if the same were herein set forth in extenso; and alleges that at all times since said January 2, 1900 it has continued to and does now operate its said tracks on said portion of said Center Street.

4. Admits and alleges that for several years prior to the filing of the petition for mandamus herein that portion of said Center Street extending from Seventeenth Street to Teutonia Avenue lying between lines drawn parallel with and one foot outside of the outside rails of the defendant's tracks therein was composed of macadam.

5. Admits and alleges that about one year prior to the filing of said petition the City of Milwaukee paved all that portion of Center Street extending from Seventeenth Street to Teutonia Avenue outside of the portion or zone described in paragraph 4 with an asphalt pavement on a concrete foundation; and alleges that during
95 all of the times prior to the paving mentioned in this paragraph all of said Center Street extending from Seventeenth Street to Teutonia Avenue was composed of the same material mentioned in said paragraph 4.

6. Admits and alleges that on November 8, 1915, the Common Council of the City of Milwaukee in form passed the pretended ordinance set forth in paragraph 5 of the petition for writ of mandamus herein.

7. Alleges that at the time that the alternative writ of mandamus herein was issued and served upon it this defendant had commenced the reconstruction of its tracks on said Center Street from Seventeenth Street to Teutonia Avenue; that its east-bound tracks had been wholly removed for the purpose of excavation for the reduction to grade of said tracks and that about one-half of the same had been reconstructed to the grade of said street, and that it was about to remove its west-bound track for said purpose; and that it had informed the officers of said City of Milwaukee that it did not consider said pretended ordinance of November 8, 1915, to be valid or of any force or effect, and that it intended to complete the operate of reducing its tracks to the grade of said street and then to put the zone described in the foregoing paragraph 4 in good repair with macadam, that being the same material which the said City had last used in said space and the street previous thereto; and this defendant further alleges that it has since completed the operation of so reconstructing its tracks to the grade of said street and has placed the said portion of said Center Street in the zone described in paragraph 4 in good repair and condition with the same material as the City last used in said space previous thereto, no agreement having at any time been entered into between this defendant and the Board of Public Works of said City or the Commissioner of Public Works of said City for the use
96 of any other material.

8. That at all times after the zone mentioned in paragraph 4 hereof was constructed with macadam and at the time of said paving by said City with asphalt as above alleged and at all times thereafter, except during the operation of reconstructing and relaying the defendant's tracks therein, the same was and is now being by the defendant kept and maintained in good repair and condition with macadam, that being the same material as the City had last used in said space and the street.

9. Defendant alleges that after the passage and adoption of said ordinance of January 2, 1900, various franchises were duly granted from time to time by the Common Council of said City giving to the defendant the right to lay, construct, operate and maintain street railway tracks in a large number of streets and avenues in said City in addition to those mentioned in said ordinance of January 2, 1900, which various franchises provided that the rights thereby granted should be upon the same terms and conditions set forth in said ordinance of January 2, 1900, that various extensions of the limits of said City were made from time to time by virtue of which, under said ordinance of January 2, 1900, the defendant was authorized and obligated to extend many of its existing lines and to operate the same upon the terms and conditions of said ordinance; that from time to time thereafter a portion of the streets and avenues on which this defendant was operating under and pursuant to said ordinance of January 2, 1900, and said franchises thereafter so granted, and a large number of streets and avenues on which the defendant was operating on January 2, 1900, were paved, repaved, improved and reconstructed, and that at all times after the passage of said ordinance of January 2, 1900, and until the year 1912, the said City
97 and this defendant construed the provisions thereof relative to pavement repairs, and particularly section 2 thereof, as applying in respect to the various streets and avenues on which the defendant's tracks were being operated on January 2, 1900, and as requiring the defendant with respect to all said streets and avenues to keep the road way in the spaces described in section 2 of said ordinance in good repair with the same material which had last been used by said City to pave or repave those spaces except in cases where this defendant and the Board of Public Works of said City or the Commissioner of Public Works of said City, upon whom the duties of said Board now devolve, had agreed upon some other material, and as not requiring this defendant to lay or construct a pavement in any of said spaces of a kind or class differing from that which the City had last theretofore used in paving or repaving the same; that at some time during the year 1912 the said City for the first time indicated that it would no longer abide by such practical construction and that at no time prior to the year 1912 did said City, after the passage and adoption of said ordinance, demand of this defendant that it lay or construct any new pavement in the spaces hereinbefore referred to on any of said streets or avenues, or that it keep or maintain the roadway in said spaces on any of said streets in repair with any material differing from that which had last been used therein by said City.

10. That defendant has faithfully and fully performed all the terms and conditions and obligations imposed upon it under and by virtue of the aforesaid ordinances of September 21, 1891, and January 2, 1900; that said ordinance of January 2, 1900, constituted and became a contract between the State of Wisconsin and the City of Milwaukee and this defendant with reference to the only
98 duties or obligations which should be imposed upon or exacted of this defendant with respect to the repairing or maintaining of the pavement of the streets upon which its tracks were being operating, and particularly of the portion of said Center Street hereinbefore described; and that said pretended ordinance of November 8, 1915, or any ordinance or law attempting to impose upon this defendant any greater duty or obligation in reference to the repairing or maintenance of said pavements, would be a law impairing the obligation of a contract and would be an act of the State of Wisconsin depriving said defendant of property without due process of law and would be a denial to said defendant of the equal protection of the law, and would be in violation of the Constitution of the United States, and particularly would be a violation of Section 10 of Article I of the Constitution of the United States and of Section 1 of Article XIV of the Amendments to the Constitution of the United States.

11. Alleges that at the time of the passage of said pretended ordinance of November 8, 1915, and for a long time prior thereto the earnings of this defendant from its street railway system in the City of Milwaukee were considerably under six per cent (6%) of the value of the property used and useful for the conduct of said street railway system and were and are less than an adequate or reasonable return; that the imposition of the additional burden involved in the expenditures necessary to comply with the directions of said pretended ordinance is an unreasonable action on the part of said Common Council and that said pretended ordinance as a whole is unreasonable and oppressive; and that at the time of the attempted passage of said ordinance said Common Council was and is without power to pass said pretended ordinance and that the same is wholly null and void.

99 12. This defendant further denies each and every matter, allegation and thing alleged or contained in the petition of said petitioner, City of Milwaukee, praying for a writ of mandamus in the above entitled proceeding not herein before expressly admitted.

All of which is respectfully submitted.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY,
By R. B. STEARNS, *Vice-President.*

MILLER, MACK & FAIRCHILD,
Attorneys for Defendant.

100 STATE OF WISCONSIN,
Milwaukee County, ss:

R. B. Stearns, being duly sworn, deposes and says that he is the Vice-prest. of The Milwaukee Electric Railway & Light Company,

the defendant above named, and makes this verification on its behalf, and is duly authorized so to do; that he has read the foregoing amended return and knows the contents thereof, and that the *said* is true to his own knowledge, except as to the matters therein set forth on information and belief, and as to those matters he believes it to be true; that the reason he makes this verification is that the said defendant is a corporation and he is such officer thereof as aforesaid; that the source of his knowledge and information and the grounds of his belief are his connection with the affairs of said Company as such officer, and the reports made to him by employes of said defendant.

R. B. STEARNS.

Subscribed and sworn to before me this 3rd day of November, A. D. 1916.

[SEAL.] P. W. KLABUNDE,
Notary Public, Milwaukee County, Wisconsin.

My commission expires Feb. 10, 1918.

101 EXHIBIT A.

An Ordinance to authorize the Milwaukee Street Railway Company, its successors and assigns to extend its tracks on certain streets mentioned therein, and for other purposes.

The mayor and common council of the city of Milwaukee do ordain as follows:

Section 1. The Milwaukee Street Railway Company its successors and assigns, are hereby authorized to extend its present tracks at the corner of Center and Teutonia streets, along Center street, westerly to Seventeenth street, thence northerly on Seventeenth street to the Hopkins road (so-called); thence northwesterly on the Hopkins road to the city limits.

Section 2. This ordinance is passed on the condition and subject to the agreement upon the part of the Milwaukee Street Railway Company that it will surrender any and all rights which it may have to place its tracks upon Teutonia street, heretofore mentioned, from its intersection with Center street north to the city limits, and the building of the lines granted by this ordinance are accepted and agreed to on the part of the said Milwaukee Street Railway Company as an acceptance of the conditions imposed in this section.

Passed September 21, 1891.

102 EXHIBIT B.

An Ordinance authorizing the Milwaukee Electric Railway & Light Company to construct, maintain and operate street railways in the city of Milwaukee over and along the streets, highways, bridges and viaducts named herein, and providing for a uniform and concurrent date for the termination of all franchises and right-of-ways

heretofore or hereby granted to said company, or to its predecessors and assigns, and providing for the rates of fare to be charged and for certain transfer privileges.

The mayor and common council of the city of Milwaukee do ordain as follows:

Section 1. There is hereby given and granted to The Milwaukee Electric Railway & Light company, hereinafter called the railway company, its successors and assigns, the right, permission and authority to lay, construct, maintain and operate a single or double track for street railways, for the carrying of passengers, with all necessary and convenient tracks, turnouts, sidetracks, connections, cross-overs and switches, and to erect and maintain necessary or convenient poles on those streets of the city of Milwaukee and in the manner and upon the conditions herein set forth.

Sec. 2. The poles of said railway company are to be placed or replaced according to a plan submitted to and approved by the board of public works; provided, however, that said board shall have the right to change the location of poles as indicated on the plan so submitted, and all poles to be placed or replaced according to the said approved plan and under the supervision and direction of the said board of public works. The track of the said railway shall be of the gauge of not more nor less than four feet eight and one-half inches, and shall not be elevated above nor depressed below the established grade of the street. It shall be laid with modern improved rails, as approved by the board of public works, and in such manner that carriages and other vehicles can easily and freely cross said
103 streets at any and all points and in any and all directions, without obstruction, and shall be laid as near the center of said streets and as near together as practicable. It shall be the duty of said railway company at all times to keep in good repair the roadway between the rails and for one foot on the outside of each rail as laid, and the space between the two inside rails of its double tracks with the same material as the city shall have last used to pave or repave these spaces and the street previous to such repairs, unless the said railway company and the board of public works of said city shall agree upon some other material, and said company shall then use the material agreed upon. Said railway company shall operate thereon street railway cars and carriages by means of power produced by electricity conducted upon wires suspended over and above its tracks, or such other power as may be agreed upon between said city and the said railway company, its successors and assigns.

Sec. 3. All rights reserved or secured to said city by and under all ordinances now in force or the laws of Wisconsin relating to regulating the speed and headway of cars, the time that cars shall be operated each day, the laying of tracks, stringing of wires, and the use and operation of all cars and tracks and everything connected with the exercise of the rights hereby or heretofore granted to said railway company and its predecessors, are hereby reserved to said city the same as though this ordinance had not been passed, and the same

shall extend and apply to all franchises hereby granted except as herein otherwise expressly provided.

Sec. 4. There is hereby given and granted to the said railway company, in addition to the streets, avenues, viaducts, subways, and bridges now occupied and used by said railway company in said city for the purpose and use set forth in section 1 of this ordinance,
104 and for the use and in the manner set forth in this ordinance, these further rights, to-wit:

1. On First avenue, commencing at the city limits on the south, thence north on said First avenue to the First avenue viaduct, thence on said viaduct to First avenue bridge, thence over said bridge to First avenue and sixth street bridge, thence on and across said Sixth street bridge and viaduct and their approaches to Sixth street, thence on Sixth street from and over Sixth street viaduct to Clybourn street; also on Sixth street from Grand avenue north to State street; and in case said company, its successors or assigns, shall not have the said line completed and in full operation within two years from and after the passage and acceptance of this ordinance, then the above license and grant shall be null and void.

2. Commencing at the intersection of Windlake avenue and Eighth avenue, thence south on Eighth avenue to the city limits.

3. Commencing at the north terminus of Western avenue, thence southerly along said Western avenue to the southern terminus thereof, and on any extension of said avenue hereafter made within the limits of said city.

4. Commencing at the intersection of Western avenue and Locust street, thence easterly on said Locust street to Folsom street bridge, so-called, thence over and across said bridge and its approaches to Folsom street, thence easterly on said Folsom street to Downer avenue.

5. Beginning at the northerly limits of said city on Maryland avenue, thence south on Maryland avenue to Park place, thence west on Park place to Oakland avenue, thence south on Oakland avenue to North avenue; and on Brady street from Warren avenue to Farwell avenue.

105 6. On the west side of River street from the tracks of said railway company on Oneida street north to the north line of the lots and property owned by said railway company and now used for its power house; and on Wisconsin street from Marshall street to the end of said street.

7. On Second street from Sycamore street south to the alley running east and west through block 75, in the Fourth ward, thence west on said alley to Third street; and the said railway company is authorized to make all necessary switches and connections from the lines on Sycamore street, Second street and Third street into the car station to be erected upon said block 75.

8. Commencing at the northerly limits of said city on Humboldt avenue, thence south on said Humboldt avenue to Concordia avenue, thence west on Concordia avenue to Holton street, and on Holton street from Chambers street north to the northerly limits of said city.

9. Commencing at the intersection of Harmon and Holton streets,

thence south on Holton street to the Holton street viaduct, so-called, thence south over and across said viaduct and bridge and the approaches thereto to Van Buren street, thence south on Van Buren street to Brady street; provided, however, that in case said railway company shall construct its line over and across said Holton street viaduct, then and in that case all rights heretofore granted to said railway company or its predecessors for the construction of a line of railway on Harmon street from Holton street to Island avenue and on Island avenue from Harmon street south to the Pleasant street bridge, so-called, and across said Pleasant street bridge to North Water street, shall cease and determine, and said railway company shall remove its tracks from said street and bridge immediately upon the operation of its railway over said Holton street viaduct, and replace said streets and bridge in as good condition as the remaining portions of
106 said streets and bridge, and to the satisfaction of the board of public works of said city.

10. Commencing at the intersection of Twelfth and Burleigh streets, thence west on Burleigh street to Teutonia avenue, thence in a northerly and northwesterly direction on said Teutonia avenue to the city limits.

11. On North avenue from its intersection with Fond du Lac avenue west to the city limits, and on North avenue from Farwell avenue east to the west line of Lake avenue.

Provided, however, that the said railway company shall widen the roadway of said First avenue three feet on each side from the viaduct south to the intersection of Mitchell street, at its sole cost and expenses. And provided further, that where the balance of the roadway of said First avenue south of Mitchell street, and that of Folsom place, in the Eighteenth ward, is less than forty feet in width between the curb lines, and the roadways of said streets shall be widened by order of the common council upon petition or otherwise, the said work shall be done at the sole cost and expenses of said railway company upon so much of said street as shall be occupied by the tracks of the said company.

Provided, however, that said railway company shall not run or operate any car- or carriages on or over any viaduct, bridge or approaches thereto on which or over which it does not now operate its cars or carriages until it shall *of* its own cost, under the direction of the board of public works and city engineer of said city, widen or strengthen or both widen and strengthen the viaduct, bridge and approaches thereto as the operation of street cars and the safety of public travel may require, and as shall be determined by said board of public works and city engineer; provided, however, that all necessary approaches to said Sixth street viaduct shall be built and
107 maintained by said railway company at its own proper cost and charge; and in case the widening and strengthening of said viaduct shall cause any additional expense in the maintenance thereof, which now by law is required to be done by the Chicago, Milwaukee & St. Paul Railway company, and it shall be determined by any court having jurisdiction thereof that the whole or any part of the expense of such maintenance shall not be chargeable to said

Chicago, Milwaukee & St. Paul Railway company, then and in that case the expense of maintaining and keeping in repair said Sixth street viaduct and the approaches thereto which shall not be chargeable to said Chicago, Milwaukee & St. Paul Railway company shall be borne by said railway company; it being the intent and understanding of this provision and condition that under no circumstances shall said city become liable for any other or further expenses in the maintenance and repair of said viaduct and the approaches thereto than are now provided for by an ordinance passed April 15th, 1878 and in case the said viaduct or any approach thereto shall thereafter break or become through any means unsafe for travel, or the operation of cars thereon, the same shall be promptly repaired to the satisfaction of said board of public works and city engineer by said railway company within a reasonable time fixed by the said engineer, and under his direction, and if the said railway company shall fail or neglect to fix or repair the same within such reasonable time, then the said city engineer and board of public works shall have the right to fix or repair the same at the charge and expense of the said railway company.

Provided, further, that in case the widening and strengthening of said First avenue viaduct, together with the approaches thereto, shall cause any additional expense in the maintenance thereof, which now by law is required to be done by the Chicago, Milwaukee & St. Paul Railway company, and it shall be determined by any court having jurisdiction thereof that the whole or any part of the expense of such maintenance shall not be chargeable to said
108 Chicago, Milwaukee & St. Paul Railway company, then and in that case all the expenses of keeping in repair said First avenue viaduct and the approaches thereto which shall not be chargeable to said Chicago, Milwaukee & St. Paul Railway company shall be borne by the said railway company; it being the intent and understanding of this provision and condition that under no circumstances shall said city become liable for any other or further expense in the maintenance and repair of said viaduct and the approaches thereto than are now provided for by resolution passed August 3, 1885; and in case said viaduct and approaches thereto shall thereafter break or become through any means unsafe for travel or the operation of cars thereon, the same shall promptly be repaired to the satisfaction of said board of public works and city engineer by the said railway company within a reasonable time fixed by said city engineer and under his direction, and if said railway company shall fail or neglect to fix or repair the same within a reasonable time fixed by the said engineer, then the said work may be done by said board of public works and city engineer at the cost and expense of said railway company. Provided, further, that the said railway company shall not be required to widen the approaches to said Holton street viaduct but all other provisions hereof shall extend and apply to said Holton street viaduct.

Provided, further, that in case of the extension of the city limits in the future, then said railway company is hereby authorized and obligated to make extension of any of its lines now or hereafter,

reaching the city limits as they now exist to the said city limits when so extended, and in case said railway company shall refuse or neglect to so extend its lines on its own motion, then the common council of said city shall by resolution duly adopted order and direct said railway company to extend its lines to the city limits within such time as may be specified in such resolution, and said company shall comply therewith. And said railway company shall extend its tracks over any and all such streets of said city as the common council shall at any time by ordinance direct, but shall not be obliged to so extend its tracks unless there is a reasonable necessity therefor for the convenience of public travel; and when any such extension shall be made, all and singular the provisions of this ordinance relating to the operation thereof shall apply the same as though the provisions of this ordinance were made a part of the ordinance requiring such extension. Provided, however, that said railway company shall not be compelled to extend its lines from any of its terminal points to the city limits except over and along the street or avenue upon which such terminus is located, and in no case shall said railway company be compelled to extend its lines unless the streets or avenues over which such extension is to be made shall first have been made to the established grade.

Sec. 5. All the rights, privileges and franchises conferred by this ordinance shall be for and during the term commencing at the passage and publication of this ordinance and acceptance thereof and ending Dec. 31, 1934; and it is further expressly provided and agreed to by said railway company that all rights, privileges and franchises heretofore conferred upon the said company and its predecessors or companies of which it is the successors or assignee, shall be extended to and shall expire on Dec. 31, 1934; and any and all ordinances or franchises conferring rights upon said railway company or its predecessors of which it is the successor or assign, and which are without date of termination or expiration, shall expire on Dec. 31, 1934. If said railway company now owns or shall hereafter acquire or own any street railway lying beyond the present corporate limits of said city, and if the said corporate limits shall at any time be extended or the territory within which the said railways lie shall be annexed to said city and made a part thereof, then all such franchises of said railway company within such corporate limits shall expire on Dec. 31, 1934; it being the intention that the franchises of all street railways owned and operated by the said railway company, within the corporate limits of said city as such limits shall exist on Dec. 31, 1934, shall expire on that day.

Sec. 6. After the passage, publication and acceptance of this ordinance by said railway company, the rate of fare for one continuous passage upon the lines of railway within said city limits of said city owned and operated by said railway company constructed under any franchise herein, heretofore or hereafter granted to said railway company or its predecessors, successors or assigns, as the case may be, shall be not to exceed five cents for a single fare, except for

children under ten years of age the rate of fare shall be three cents for one child and five cents for two children, and infants under three of age free. Except where cars or carriages shall be chartered at a special price, which fare shall entitle each passenger, upon demand made at the time of payment of fare, to one transfer at established points of transfer to any connecting or cross line of said railway company, for passage within said city, and convenient points of transfer shall be maintained and such additional points of transfer established as will carry out the full intent and purpose of this ordinance to maintain and extend the transfer system now in force upon the lines of said railway company at the present standard of convenience for the people of said city. Each transfer ticket shall be good only for the passenger to whom it is issued, and for a continuous trip in the direction specified upon the transfer so given, and upon the first car leaving the transfer intersection after the time designated on such transfer.

Provided, however, that after the acceptance of the terms of this ordinance the railway company shall, on demand made at its office in said city, or to the conductors on its cars operated on its lines within the corporate limits of said city, sell tickets in packages of twenty-five for one dollar or six for twenty-five cents, each of which tickets shall entitle the holder thereof to use the same upon
111 the cars of said railway company only between the hours of 5:30 o'clock and 8:00 o'clock in the morning and between the hours of 5:00 o'clock and 7:00 o'clock, central standard time, in the afternoon of each day until Jan. 1, 1905, and shall also entitle the holder to the same privileges as are or may be accorded to passengers paying a cash fare of five cents; and the said railway company shall, from and after Jan. 1, 1905, continue the sale of tickets in packages at the price aforesaid until Dec. 31, 1934, each to be good at all hours of the day, with same privileges as are or may be accorded to passengers paying a single cash fare of five cents.

Provided further, that the said railway company, its successors and assigns shall keep in a conspicuous place in their cars for the convenience of passengers a timepiece, to be regulated by central standard time.

Sec. 7. All rights, privileges, grants and franchises heretofore granted by said city to said railway company and the several corporations or parties from or through whom it has acquired, the same are hereby confirmed and granted to said railway company, its successors and assigns, except as herein modified or changed.

Sec. 8. In consideration of the rights and privileges hereby granted to said railway company, the said railway company shall at all times furnish to said city electric power necessary and sufficient to swing and operate all draw bridges now or hereafter maintained by said city and crossed by said railway company, and said company shall furnish and provide all necessary connections, conductors, circuits and everything whatsoever required to connect all such bridges with the power plant or plants maintained by said railway company, so that the electric power can be thereby properly and safely transmitted and applied.

Sec. 9. Whenever the said city shall determine to pave or repave any street upon which street car tracks are or shall be situate, the board of public works shall give notice thereof to said rail-
112 way company, and thereupon said railway company shall immediately make all such repairs, connections, conduits and improvements as it shall then deem necessary for the use and operation of its tracks and railway; after any such street shall be paved by said city, the pavements thereon and the pavements upon any and all streets heretofore paved by said city shall not be opened or disturbed by said railway company for any purpose whatsoever, except by permission in writing therefor signed by the mayor and the members of the said board of public works. And whenever any such permit shall be given the city engineer shall promptly give plans and specifications for opening and closing the pavement, and said railway company shall do such work according to such plans and specifications and under the supervision of said board of public works and city engineer and to their satisfaction, and said board shall have power to employ necessary and competent inspector or inspectors to actively superintend the work, and his compensation shall be paid by said railway company; and if said railway company shall fail or neglect or refuse to properly replace or repair any pavement so opened the city shall have the right to replace or repair the same by and under the direction of said board of public works, and said railway company shall pay the actual cost and expense thereof.

Sec. 10. The provisions of all ordinances now existing so far as the same or any or either of them relate to the use and operation of said railways, such as the removal of snow and ice therefrom, the joint use of tracks by other companies or persons, the occupation and use of streets, bridges and public places, and the repairing, replacing, strengthening and maintaining the same, the gauge, grade and elevation of tracks, and the manner of constructing the same shall not be construed or deemed to be repealed hereby, but shall be and remain in force with the same effect as though this ordinance had not been passed.

113 Sec. 11. In consideration of the rights and privileges hereby granted, said railway company shall at all times carry and transport upon any and all of its cars (except on special or chartered cars) operated upon said railways, all members of the police, fire and health departments of said city when in uniform, and all detectives of the police department of said city; and the rights and privileges hereby granted shall be considered to be prepayment by said city of all fares of all such members and officers of said departments.

Sec. 12. Whenever the words "railway company" are used in this ordinance it shall be deemed to mean The Milwaukee Electric Railway & Light company and its successors and assigns; and whenever the word "city" or "said city" are used herein it shall be deemed to mean the city of Milwaukee as presently organized and all territory included within any and all extensions of the limits of said city hereafter made during the life of the rights hereby granted or confirmed.

Sec. 13. Before said railway company shall exercise any of the

rights, privileges or franchises provided for in this ordinance, it shall file with the city clerk of said city its written acceptance of and agreement to all of the terms and conditions contained in this ordinance, and also a list of all the transfer points now established by said railway company within said city; and in no event shall this ordinance or any provisions thereof take effect until such acceptance and agreement is filed; and if said railway company shall fail, neglect or refuse to file the same as herein required, within thirty days after the passage and publication hereof, then this ordinance and all and singular its provisions shall stand for naught, the same as though it had never been passed.

Sec. 14. This ordinance shall take effect and be in force from and after its passage and publication.

Passed January 2, 1900.

114 (Indorsements:) No. 47813. State of Wisconsin, Circuit Court, Milwaukee County. State of Wisconsin ex Rel. City of Milwaukee, Petitioner, vs. The Milwaukee Electric Railway & Light Company, Defendant. Amended Return to Alternative Writ of Mandamus. Original. Miller, Mack & Fairchild, Milwaukee. Filed 2 Nov. 8, 1916, 2. C. C. Maas, Clerk. Filed Nov. 28, 1916. Arthur A. McLeod, Clerk of Supreme Court, Wis. Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

115 Filed 2 Nov. 18, 1916, 2. C. C. Maas, Clerk.

Filed Nov. 28, 1916. Arthur A. McLeod, Clerk of Supreme Court, Wis.

Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

#47813.

STATE OF WISCONSIN ex Rel. CITY OF MILWAUKEE, Petitioner,

vs.

THE MILWAUKEE ELECTRIC RAILWAY AND LIGHT COMPANY, Defendant.

(Center Street Paving.)

The petitioner having demurred to the defendant's return in the above entitled action, and the defendant having filed an amended return, and the parties having stipulated through their respective counsel that the petitioner's demurrer should stand as a demurrer to the amended return; and the matter having been sufficiently argued in

open court before the Hon. Oscar M. Fritz, judge presiding, the city of Milwaukee being represented by its City Attorney, Clifton Williams, and the defendant by Messrs. Miller, Mack & Fairchild, Mr. J. G. Hardgrove appearing; and the court being sufficiently advised in the premises, now on motion of the City Attorney for the City of Milwaukee,

It Is Ordered, that the demurrer to the return and the amended return be and the same is hereby sustained, with leave to the defendant to further plead within twenty days.

Dated Nov. 18th, 1916.

By the Court,

OSCAR M. FRITZ,
Circuit Judge.

116 (Indorsements:) Original. No. 47813. State of Wisconsin, Circuit Court, Milwaukee County. State ex Rel. City of Milwaukee, Plaintiff, vs. The Milwaukee Electric Ry. and Light Company, Defendant. Order Sustaining Demurrer to Return. Clifton Williams, City Attorney, City Hall, Milwaukee. Service of a copy of within — admitted this — day of ——, 191-. ——— ———, ——— ———, Attorneys for ——— ———. Filed 2 Nov. 18, 1916, 2. C. C. Maas, Clerk. — folio-. Filed Nov. 28, 1916. Arthur A. McLeod, Clerk of Supreme Court, Wis. Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

117 Filed Nov. 24, 1916. C. C. Maas, Clerk.

Filed Nov. 28, 1916. Arthur A. McLeod, Clerk of Supreme Court, Wis.

Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

#47813.

STATE OF WISCONSIN ex Rel. CITY OF MILWAUKEE, Petitioner,

vs.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Defendant.

(Center Street Paving Case.)

GENTLEMEN: Please take notice that The Milwaukee Electric Railway & Light Company, defendant in this action, hereby appeals to the Supreme Court of the State of Wisconsin from the whole of the order made in this action by the Circuit Court for Milwaukee County

aforesaid, dated and entered November 18, 1916, a copy of which order so appealed from is hereunto annexed.

Dated November 21, 1916.

MILLER, MACK & FAIRCHILD,
Defendant's Attorneys.

To Clifton Williams, Esq., Attorney for Petitioner; and
To C. C. Maas, Esq., as Clerk of the Circuit Court for Milwaukee County, Wisconsin.

118 STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

#47813.

STATE OF WISCONSIN ex Rel. CITY OF MILWAUKEE, Petitioner,

vs.

THE MILWAUKEE ELECTRIC RAILWAY AND LIGHT COMPANY, Defendant.

(Center Street Paving.)

The petitioner having demurred to the defendant's return in the above entitled action, and the defendant having filed an amended return, and the parties having stipulated through their respective counsel that the petitioner's demurrer should stand as a demurrer to the amended return; and the matter having been sufficiently argued in open court before the Hon. Oscar M. Fritz, judge presiding, the city of Milwaukee being represented by its City Attorney, Clifton Williams, and the defendant by Messrs. Miller, Mack & Fairchild, Mr. J. C. Hardgrove appearing; and the court being sufficiently advised in the premises, now on motion of the City Attorney for the City of Milwaukee,

It is ordered, that the demurrer to the return and the amended return be and the same is hereby sustained, with leave to the defendant to further plead within twenty days.

Dated Nov. 18th, 1916.

By the court.

OSCAR M. FRITZ,
Circuit Judge.

119 (Indorsements:) 47813. State of Wisconsin. Circuit Court, Milwaukee County. State of Wisconsin ex Rel. City of Milwaukee, Petitioner, vs. The Milwaukee Electric Railway & Light Company, Defendant. Center Street Paving Case. Notice of Appeal. Original. City of Milwaukee, Law Department. Received Nov. 23, 1916. Clifton Williams, City Attorney. Filed Nov. 24, 1916. C. C. Maas, Clerk. Miller, Mack & Fairchild, Milwaukee. Service of copy admitted Nov. 24, 1916. C. C. Maas, Clerk of Circuit

Court, Milwaukee County, Wisconsin, by Omar T. McMahon, Deputy Clerk. Filed Nov. 28, 1916. Arthur A. McLeod, Clerk of Supreme Court, Wis. Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

120 City of Milwaukee, Law Department. Received Nov. 23, 1916. Clifton Williams, City Attorney. Filed Nov. 24, 1916. C. C. Maas, Clerk.

Filed Nov. 28, 1916. Arthur A. McLeod, Clerk of Supreme Court, Wis.

Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

47813.

STATE OF WISCONSIN ex Rel. CITY OF MILWAUKEE, Petitioner,

vs.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Defendant.

(Center Street Paving Case.)

Whereas an order was made in this action on November 18, 1916, sustaining the petitioner's demurrer to the defendant's amended return to the alternative writ of mandamus herein, and said defendant feeling aggrieved thereby intends to appeal therefrom to the Supreme Court of the State of Wisconsin,

Now, therefore, Fidelity and Deposit Company of Maryland, a corporation organized and existing under and by virtue of the laws of the State of Maryland and duly authorized to do business as a suretyship corporation in the State of Wisconsin, does hereby, pursuant to the statute in such case made and provided, undertake that the said appellant will pay all costs and damages which may be awarded against it on said appeal not exceeding Two Hundred and Fifty Dollars ($250.00).

Dated November 23rd, 1916.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND, [SEAL.]
By WM. M. WOLFF, *Attorney-in-Fact.*

121 (Indorsements:) 47813. State of Wisconsin. Circuit Court, Milwaukee County. State of Wisconsin ex Rel. City of Milwaukee, Petitioner, vs. The Milwaukee Electric Railway & Light Company, Defendant. Center Street Paving Case. Undertak-

ing on Appeal. Original. City of Milwaukee, Law Department. Received Nov. 23, 1916. Clifton Williams, City Attorney. Filed Nov. 24, 1916. C. C. Maas, Clerk. Miller, Mack & Fairchild, Milwaukee. Service of copy admitted Nov. 24, 1916. C. C. Maas, Clerk of Circuit Court, Milwaukee County, Wisconsin, by Omar T. McMahon, Deputy Clerk. Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis. Filed Nov. 28, 1916. Arthur A. McLeod, Clerk of Supreme Court, Wis.

122 THE STATE OF WISCONSIN,
Circuit Court, Milwaukee County, ss:

STATE OF WISCONSIN ex Rel. CITY OF MILWAUKEE, Plaintiff,

vs.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Defendant.

STATE OF WISCONSIN,
Milwaukee County, ss:

I, C. C. Maas, Clerk of the Circuit Court, in and for the County of Milwaukee and State of Wisconsin, do hereby certify that the annexed and foregoing are the original notice of appeal and undertaking in the above entitled action, the original order mentioned in said notice of appeal, and all the original papers used by each party on the application for the order appealed from, and the same are transmitted to the Supreme Court pursuant to such appeal.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, this 27th day of November, A. D. 1916.

[SEAL.] C. C. MAAS, *Clerk.*

123 (Indorsements:) Circuit Court, Milwaukee County. State of Wisconsin ex Rel. City of Milwaukee, against The Milwaukee Electric Railway & Light Company. Return on Appeal to the Supreme Court. Filed Nov. 28, 1916. Arthur A. McLeod, Clerk of Supreme Court, Wis. Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

124 Be it remembered, that at a term of the Supreme Court of the State of Wisconsin, begun and held at the Capitol, in Madison, the seat of government of said State, on the second Tuesday, to-wit, on the ninth day of January A. D. 1917, on the eleventh day of the term, to-wit: On the 13th day of March, A. D. 1917.

Present: John B. Winslow, Chief Justice; R. D. Marshall, Robert G. Siebecker, James C. Kerwin, Aad J. Vinje, Marvin B. Rosenberry, and Franz C. Eschweiler, Justices of said Court.

The following proceedings were had, Inter Alia, to-wit:

STATE OF WISCONSIN ex Rel. CITY OF MILWAUKEE, Respondent,

vs.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant.

Appeal from Circuit Court Milwaukee County, State of Wisconsin.

(Center Street Paving Case.)

This cause came on to be heard on appeal from the judgment of the Circuit Court of Milwaukee County and was argued by counsel. On consideration whereof; it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Milwaukee County, in this cause, be, and the same is hereby, affirmed with costs against the said appellant taxed at the sum of Forty-two Dollars ($42.00).

STATE OF WISCONSIN,
Supreme Court, ss:

I, Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original order and judgment of the Court in the above entitled cause, and that it is a correct transcript therefrom, and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at Madison, this 20th day of April, A. D. 1917.

[Seal Supreme Court of Wisconsin.]

ARTHUR A. McLEOD,
Clerk of the Supreme Court of the State of Wisconsin.

125 (Indorsements:) 47813. State of Wisconsin, Supreme Court. State ex Rel. City of Milwaukee, Respondent, vs. T. M. E. R. & L. Co., Appellant. Remittitur. Filed Apr. 21, 1917. C. C. Maas, Clerk. Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

126 Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

Filed Nov. 16, 1917. C. C. Maas, Clerk.

STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

#47813.

STATE OF WISCONSIN ex Rel. CITY OF MILWAUKEE, Petitioner,

vs.

THE MILWAUKEE ELECTRIC RAILWAY AND LIGHT COMPANY, Defendant.

To Messrs. Miller, Mack & Fairchild, Attorneys for Defendant:

Please take notice, that the record in the above entitled matter has been remitted to the Circuit Court of Milwaukee County and is now on file in the office of the Clerk of said Court, and that if no further pleading is entered by the defendant within twenty days from date hereof, in accordance with the order of affirmance in said matter, the petitioner will apply to the said court for the entry of a peremptory writ of mandamus.

Dated April 23rd, 1917.

Yours, etc.,

CLIFTON WILLIAMS,
City Attorney.

127 (Indorsements:) Copy. No. 47813. State of Wisconsin Circuit Court, Milwaukee County. State ex Rel. City of Milwaukee, Plaintiff, vs. The Milw. Electric Ry. & L. Co., Defendant. Natuce of Remittitur. Clifton Williams, City Attorney, City Hall, Milwaukee. Service of a copy of within notice admitted this 24th day of April, 1917. Miller, Mack & Fairchild, Attorneys for Defendant. Filed May 16, 1917. C. C. Maas, Clerk. Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

128 Filed May 23, 1917. C. C. Maas, Clerk.

Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

#47813.

STATE OF WISCONSIN ex Rel. CITY OF MILWAUKEE, Relator,

vs.

THE MILWAUKEE ELECTRIC RAILWAY AND LIGHT COMPANY, Respondent.

To Messrs. Miller, Mack & Fairchild, Attorneys for Respondent:

Please take notice, that the relator in the above entitled action will apply to the Circuit Court of Milwaukee County, Wisconsin in that branch thereof presided over by Hon. O. C. Fritz, on June 2nd, 1917, at the opening of court on that day, or as soon thereafter as counsel can be heard, for judgment for the failure of the respondent to further plead in accordance with the order of the court which has been affirmed by the Supreme Court.

Dated May 23rd, 1917.

Yours, etc., CLIFTON WILLIAMS,
City Attorney.

129 (Indorsements:) No. 47813. State of Wisconsin. Circuit Court, Milwaukee County. State ex Rel. City of Milwaukee, Relator, vs. The Milw. Electric Ry. & L. Co., Respondent. Notice of Application for Judgment. Clifton Williams, City Attorney, City Hall, Milwaukee. Received May 23, 1917. Miller, Mack & Fairchild. Filed May 23, 1917. C. C. Maas, Clerk. Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

130 Filed 2 Jun- 2, 1917, 2. C. C. Maas, Clerk.

Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

#47813.

STATE OF WISCONSIN ex Rel. CITY OF MILWAUKEE, Relator,

vs.

THE MILWAUKEE ELECTRIC RAILWAY AND LIGHT COMPANY, Respondent.

Upon the annexed affidavit of Garfield S. Canright, Assistant City Attorney, and one of the attorneys for the petitioner and

relator in the above entitled action, and upon all the records, files and proceedings in this action, showing that no further pleading has been made by respondent within twenty days from the date of the notice of remittitur;

It is hereby ordered, that judgment be entered in the above entitled action directing the immediate issue of a peremptory writ as prayed for in the petition; and,

It is further ordered, that said judgment shall carry and be for the relator's taxable costs.

Dated June 2, 1917.

By the Court.

OSCAR M. FRITZ,
Circuit Judge.

131 STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

#47813.

STATE OF WISCONSIN ex Rel. CITY OF MILWAUKEE, Relator,

vs.

THE MILWAUKEE ELECTRIC RAILWAY AND LIGHT COMPANY, Respondent.

STATE OF WISCONSIN,
Milwaukee County, ss:

Garfield S. Canright, being first duly sworn on oath deposes and says that he is one of the attorneys for the relator in the above entitled action; that more than twenty days have expired since the service of the notice of remittitur in the above entitled action, and that no further pleadings have been served or filed by the respondent in the above entitled action; that deponent makes this affidavit for the purpose of applying to the court for a judgment and as proof that no further pleadings have been served in the above entitled action within twenty days after notice of the remittitur from the Supreme Court and within the required time since the Supreme Court affirmed the decision of the Circuit Court sustaining the relator's demurrer to the return of the respondent, and that the time granted by the court for such further return has expired.

GARFIELD S. CANRIGHT.

Subscribed and sworn to before me this 2nd day of June, 1917.

MADGE E. MATHE,
Notary Public, Milwaukee Co., Wis.

My commission expires 11/21/1920.

132 (Indorsements:) No. 47813. State of Wisconsin. Circuit Court, Milwaukee County. State ex Rel. City of Milwaukee,

Relator, vs. The Milw. Electric Ry. & Light Co., Respondent. Affidavit of No Answer and Order for Judgment. Clifton Williams, City Attorney, City Hall, Milwaukee. Filed 2 Jun- 2, 1917, 2. C. C. Maas, Clerk. Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

133 Filed Jun- 12, 1917. C. C. Maas, Clerk.

Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

No. 47813.

STATE OF WISCONSIN ex Rel. CITY OF MILWAUKEE, Relator,

vs.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

The defendant excepts to the order for judgment entered herein on June 2, 1917.

Dated June 12, 1917.

MILLER, MACK, & FAIRCHILD,
Attorneys for Defendant.

134 (Indorsements:) No. 47813. State of Wisconsin. Circuit Court, Milwaukee County. State of Wisconsin ex Rel. City of Milwaukee, Relator, vs. The Milwaukee Electric Railway & Light Company, Respondent. Exception to Order. Original. Miller, Mack & Fairchild, Milwaukee. Filed Jun- 12, 1917. C. C. Maas, Clerk. Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

135 STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

No. 47813.

STATE ex Rel. CITY OF MILWAUKEE, Relator,

vs.

THE MILWAUKEE ELECTRIC RAILWAY AND LIGHT COMPANY, Respondent.

Center Street Paving Case.

Judgment.

The above named relator, having duly made its petition to the Honorable Circuit Court of Milwaukee County, and having filed the

same with the clerk of the said court praying for the issuance of an alternative writ of mandamus, and said alternative writ of mandamus having been duly issued, and the respondent having made and filed its return and amended return to said alternative writ, and the said relator having demurred to both of the same, and the demurrer having been sustained by the Circuit Court, and the order therefor having been affirmed by the Supreme Court of the State of Wisconsin, and the remittitur having been returned to this court, and a notice of said remittitur having been served twenty days ago upon the respondent according to the stipulation of the parties, and
136 the respondent having failed to file an amended return or take further proceedings in said action, and judgment having been ordered on June 2nd, 1917 in favor of the relator and against the respondent;

It is adjudged that the relator, City of Milwaukee, have a peremptory writ of mandamus and that the same do issue forthwith directed to and commanding the said respondent, The Milwaukee Electric Railway and Light Company, upon the pain and peril that shall fall thereon for refusal, that it shall, upon due service upon it of said peremptory writ, put in good and thorough repair all that portion of Center Street extending from Teutonia Avenue to Seventeenth Street between lines drawn one foot outside of each of its outside rails therein by paving the same with an asphalt pavement upon a concrete foundation, all to be of the same kind, character and specifications as that used by the City of Milwaukee in paving said portion of said Center Street outside the street car zone herein mentioned; and

It is further adjudged that the said relator, City of Milwaukee, do have and recover from the said respondent, The Milwaukee Electric Railway and Light Company, the sum of Fifty-seven and 51/100 dollars, ($57.51), costs and disbursements in this action, and that the relator have execution therefor.

Dated June 8th, 1917.

By the Court.

C. C. MAAS, *Clerk*,
By CHAS. SCHERN,
Deputy Clerk.

137 (Indorsements:) Original. No. 47813. State of Wisconsin. Circuit Court, Milwaukee County. State ex Rel. City of Milwaukee, Relator, vs. The Milwaukee Electric Railway and Light Company, Respondent. Judgment. Clifton Williams, City Attorney, City Hall, Milwaukee. Filed Jun- 8, 1917, at 11 A. M. C. C. Maas, Clerk. Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

138 Filed 2 Jun- 23, 1917, 2. C. C. Maas, Clerk.

Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

STATE OF WISCONSIN:

Circuit Court, Milwaukee County.

STATE ex Rel. CITY OF MILWAUKEE, Relator,

vs.

THE MILWAUKEE ELECTRIC RAILWAY AND LIGHT COMPANY, Respondent.

(Center Street Paving Case.)

Judgment having been entered in the above entitled action June 8, 1917, directing that a peremptory writ of mandamus issue commanding the defendant The Milwaukee Electric Railway & Light Company to put in good and thorough repair all that portion of Center Street extending from Teutonia Avenue to Seventeenth Street between lines drawn one foot outside of each of its outside rails therein by paving the same with an asphalt pavement upon a concrete foundation, all to be of the same kind, character and specifications as that used by the City of Milwaukee in paving said portion of said Center Street outside of the zone above described; and the defendant being about to appeal from said judgment to the Supreme Court of the State of Wisconsin and intending in the event of the affirmance of said judgment by the Supreme Court of the State of Wisconsin to appeal to the Supreme Court of the United States,

It is ordered that the issuance of a peremptory writ, or of an execution on the judgment made and entered in the above entitled action June 8, 1917, and the enforcement of said judgment, be stayed and the defendant relieved from obedience thereto until twenty (20) days

139 from and after service of notice of filing in the office of the Clerk of this court of the remittitur on appeal on condition that the defendant file in this court an agreement to the effect that it will in the meantime maintain the macadam in the zone described in the portion of Center Street set forth in said judgment in good repair and condition, and keep said zone properly oiled in the manner required for the maintenance of an oiled macadam roadway, and shall file an undertaking in the sum of two hundred fifty dollars ($250.00) to the effect that it will pay all costs and damages which may be awarded against it on the appeal and will pay all damages which the City of Milwaukee may have sustained by the not doing of the particular act or thing directed to be done by the judgment appealed from not exceeding two hundred fifty dollars ($250.00).

It is further ordered that in the meantime the said defendant shall be relieved from any duty under any ordinance of the city of Milwaukee to sprinkle the zone above described with water.

Dated June 23rd, 1907.

By the Court. OSCAR M. FRITZ,
Circuit Judge.

It is stipulated that the foregoing order may be entered without any other or further notice.

Dated Jun. 22, 1917.

CLIFTON WILLIAMS,
Attorney for Relator.
MILLER, MACK & FAIRCHILD,
Attorneys for Defendant and Respondent.

140 (Indorsements:) 47813. State of Wisconsin. Circuit Court, Milwaukee County. State ex Rel. City of Milwaukee, Relator, vs. The Milwaukee Electric Railway & Light Company, Respondent. Order prescribing conditions of stay. Original. Miller, Mack & Fairchild, Milwaukee. Filed 2 Jun- 23, 1917 2. C. C. Maas, Clerk. Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

141 THE STATE OF WISCONSIN,
Circuit Court, Milwaukee County, ss:

STATE ex Rel. CITY OF MILWAUKEE, Plaintiff,

vs.

THE MILWAUKEE ELECTRIC RAILWAY AND LIGHT COMPANY, Defendant.

STATE OF WISCONSIN,
Milwaukee County, ss:

I, C. C. Maas, Clerk of the Circuit Court, in and for the County of Milwaukee and State of Wisconsin, do hereby certify that the annexed and foregoing are the original papers which constitute the judgment roll, notice of appeal and undertaking in the above entitled action, and that said papers are transmitted to the Supreme Court pursuant to the notice of appeal hereto annexed.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 27th day of June, A. D., 1917.

[SEAL.] C. C. MAAS, *Clerk.*

142 (Indorsements:) Circuit Court, Milwaukee County. State ex Rel. City of Milwaukee against The Milwaukee Electric Railway & Light Company. Return on Appeal to the Supreme Court. Filed Jul- 3, 1917. Arthur A. McLeod, Clerk of Supreme Court, Wis.

143 And afterwards, to-wit, on the 3rd day of October, 1917, the same being the fourth day of the term, the following proceedings were had in said cause in this court:

STATE OF WISCONSIN:

In Supreme Court.

STATE OF WISCONSIN ex Rel. CITY OF MILWAUKEE, Respondent,

vs.

T. M. E. R. & L. Co., Appellant.

Milwaukee Circuit Court.

And now at this day came the parties herein and submitted this case to the court on case and briefs, and the court not being now sufficiently advised of and concerning its decision herein took time to consider of its opinion.

144 And afterwards, to-wit, on the 23rd day of October, A. D., 1917, the same being the 8th day of the term, the judgment of this court was rendered in words and figures following, that is to say:

STATE OF WISCONSIN:

In Supreme Court.

STATE OF WISCONSIN ex Rel. CITY OF MILWAUKEE, Respondent,

vs.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant.

Milwaukee Circuit Court.

Opinion by Justice Kerwin.

This cause came on to be heard on appeal from the judgment of the Circuit Court of Milwaukee County and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court that the judgment of the Circuit Court of Milwaukee County, in this cause, be, and the same is hereby, affirmed, with costs against the said appellant, taxed at the sum of Thirty-three Dollars and Fifty Cents ($33.50).

145 Thereupon the opinion of the Court by Justice Kerwin was filed in words and figures following, that is to say:

146 In Supreme Court, State of Wisconsin.

No. 14.

STATE OF WISCONSIN ex Rel. CITY OF MILWAUKEE, Petitioner and Respondent,

vs.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Defendant and Appellant.

KERWIN, *J.*:

This case was here before on demurrer to the defendant's return to the alternative writ of mandamus State ex Rel. Milwaukee v. Milwaukee E. R. & L. Co., 161 N. W. 745; 165 Wis. 230.

After filing the remittitur, the defendant having failed to plead further, judgment was entered in the circuit court for Milwaukee county directing the issuance of a peremptory writ of mandamus requiring the defendant to pave Center street from Teutonia Avenue to Seventeenth street between the rails of its tracks therein and for one foot outside of each of the outside rails with asphalt upon a concrete foundation.

147 The judgment of this court on the former appeal is the law of the case under repeated decisions of this court. We therefore adhere to such decision as the law of this case on all points involved on this appeal. It follows, therefore, that the judgment below must be affirmed.

By the Court: The judgment appealed from is affirmed.

148 STATE OF WISCONSIN:

In Supreme Court.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Plaintiff in Error,

vs.

STATE OF WISCONSIN ex Rel. CITY OF MILWAUKEE, Defendant in Error.

I, Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of all the record and proceedings now on file and of record in my office with all things concerning the same in the above entitled cause.

That the original writ of error, the petition therefor and order allowing the same, the citation with its service indorsed thereon, the assignment of errors, certificate of lodgment, consent of said attorney,

stipulation for transcript and a copy of the bond are appended to the return herein, and that they are all returned to the Supreme Court of the United States in obedience to the command of the writ of error hereto annexed.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Court at Madison this 14th day of December, A. D. 1917.

[Seal Supreme Court of Wisconsin.]

ARTHUR A. McLEOD,
Clerk of Supreme Court, Wisconsin.

Endorsed on cover: File No. 26,271. Wisconsin Supreme Court. Term No. 804. The Milwaukee Electric Railway & Light Company, plaintiff in error, vs. The State of Wisconsin ex Rel. City of Milwaukee. Filed December 27th, 1917. File No. 26,271.

FILED
MAR 4 1919
JAMES D. MAHER,
CLERK.

(26,271)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. [redacted]55

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, *PLAINTIFF IN ERROR,*

vs.

THE STATE OF WISCONSIN EX REL. CITY OF MILWAUKEE, *DEFENDANT IN ERROR.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

BRIEF OF DEFENDANT IN ERROR

CLIFTON WILLIAMS,
City Attorney of the City of Milwaukee.
Attorney for Defendant in Error.

Weisel Bros. Printing Co., Milwaukee

(26,271)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 324.

THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, *PLAINTIFF IN ERROR,*

vs.

THE STATE OF WISCONSIN EX REL. CITY OF MILWAUKEE, *DEFENDANT IN ERROR.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

BRIEF OF DEFENDANT IN ERROR.

BRIEF OF THE ARGUMENT.

POINT OF LAW NO. 1.

This case is exactly like the case of *Southern Wisconsin Railway Co. vs. City of Madison,* 240 U. S. 457-462.

POINT OF LAW NO. 2.

The Supreme Court of the State of Wisconsin has not changed its position in *Superior vs. Duluth Street Railway Co.,* 166 Wis., 487, since it rendered the judgment in the case at bar.

ARGUMENT.

POINT NO. 1.

In order to establish our first proposition, which is a point to the effect that the case at bar is exactly the same as the case of *Southern Wisconsin Railway Co. vs. Madison*, 240 U. S. 457, we set out here in parallel columns the main contents of the *Madison Case* and the case at bar.

MADISON CASE (240 U. S. 457)	CASE AT BAR
Original Franchise.	
Old ordinance (prior to 1892) containing paving provision. 156 Wis. 352, p. 355. 240 U. S., p. 460.	Ordinance of 1891 extending tracks on Center Street from place in question. (May have extended paving provision also.) 165 Wis., p. 231. Transcript, pp. 20, 30.
Modification in Original Franchise by Consent.	
Ordinance of 1892, which provided: "And said company shall keep the space between the rails of each track and for the space of one foot on the outside in proper repair so as not to interfere with travel over the same, and shall keep the same in proper order and cleanliness at its own cost and expense." 156 Wis. 352, p. 357. 240 U. S., p. 460.	Ordinance of 1900, which provided: "It shall be the duty of said railway company at all times to keep in good repair the roadway between the rails and for one foot on the outside of each rail as laid and the space between the two inside rails of its double tracks with the same material as the city shall have last used to pave or repave these spaces and the street previous to such repairs." 165 Wis., p. 232. Transcript, pp. 33-34.

Reservation By Ordinance.

MADISON CASE

(240 U. S. 457)

The Madison ordinance of 1892 was granted "subject to all general provisions of statute law now in force and applicable thereto and to such reasonable rules and regulations respecting such streets and highways * * * as the said council may from time to time enact."

156 Wis. 352, p. 357.

240 U. S., p. 460.

CASE AT BAR

The Milwaukee ordinance of 1900 provides:

"*All rights reserved or secured to said city by and under* all ordinances now in force or *the laws of Wisconsin relating* to regulating the speed and headway of cars, the time that cars shall be operated each day, the laying of tracks, stringing of wires, and *the use and operation* of all cars and tracks *and everything connected with the exercise of the rights hereby or heretofore granted* to said railway company and its predecessors, are hereby reserved to said city the same as though this ordinance had not been passed, and the same shall extend and apply to all franchises hereby granted except as herein otherwise expressly provided."

165 Wis., p. 236.

Transcript, p. 34.

Reservation By Statute.

MADISON CASE

(240 U. S. 457)

Section 1862 of the statutes provides:

"Every such road shall be constructed upon the most approved plan and be subject to such reasonable rules and regulations and the payment of such license fees as the proper municipal authorities may by ordinance, from time to time, prescribe. * * *"

Wisconsin Statutes 1917 and Brief of Plaintiff in Error pp. 11, 43.

CASE AT BAR

Section 1862 of the statutes provides:

"Every such road shall be constructed upon the most approved plan and be subject to such reasonable rules and regulations and the payment of such license fees as the proper municipal authorities may by ordinance, from time to time, prescribe. * * *"

Wisconsin Statutes 1917 and Brief of Plaintiff in Error pp. 11, 43.

Ordinance Passed Under Reserve.

MADISON CASE
(240 U. S. 457)

On June 10, 1910, Madison passed an ordinance ordering the railway zone to be paved with asphalt on a concrete foundation.

156 Wis. 352, 356.

240 U. S., p. 459.

CASE AT BAR

Milwaukee by ordinance of November 8, 1915, ordered the railway zone paved with asphalt on a concrete foundation.

165 Wis., p. 234.

Transcript, p. 21.

Material Then in the Zone.

MADISON CASE
(240 U. S. 457)

Macadam.

156 Wis. 352, p. 357.

240 U. S., p. 459.

CASE AT BAR

Macadam—prior to excavations for new tracks.

165 Wis., p. 232.

Transcript, pp. 20-22.

Result.

MADISON CASE
(240 U. S. 457)

It was held, and affirmed by the Supreme Court of the United States, that the company must put in asphalt, as required by the 1910 ordinances because it "fell within the reasonable rules and regulations that the company was bound to obey."

156 Wis. 352.

240 U. S. 459-462, at end of p. 460.

CASE AT BAR

It is quite a temptation, especially upon our first appearance in this Court, to engage in a long argument of the decisions of this Court and the citation of a great many of its opinions, but the winning of this case is more important to the City of Milwaukee than an attempt on our part to show great learning. Consequently, we are relying upon the rule of precedent and devoting our principal effort to this showing that the *Madison Case* and the case at bar are identical.

POINT NO. 2.

The plaintiff in error in its brief makes but one contention to avoid the fact that the Madison decision is a precedent for and in control of the case at bar, as above outlined, and that contention is very tersely stated in the brief of the plaintiff in error on page 33, as follows:

> "* * * The net result is that Sec. 1862 becomes a law meaning one thing in the City of Superior and another thing in the City of Milwaukee; is applied to protect the Duluth Street Railway Company in a contract, and is applied to deny to the plaintiff in error the same protection in substantially the same contract right."

This contention has for its basis an assumption that the Supreme Court of Wisconsin in the *Superior Street Railway Case,* 166 Wis. 487, decided that a franchise on paving repairs is a contract beyond any power of change on the part of the municipal corporation, which the plaintiff in error claims is directly opposite to the decision in the case at bar in the Wisconsin Supreme Court (165 Wis. 230). The error in the argument is an error of assumption. It is an error in the basis. It is a false premise.

The Supreme Court of the State of Wisconsin in the *Superior Case* gave heed to the contractual feature of the ordinance only with respect to the *space* involved. We do not attach any significance to the fact that the ordinance on its face stated that "This ordinance shall have the effect of and be a contract between the City of Superior and the Douglas County Street Railway Company, * * *" (166 Wis. at p. 489 and p. 493). We base our argument on the fact that the Court said that the *Superior Case* was concerning the space involved and not the kind of material. On page 494 in the *Superior Case,* 166 Wis. 487, the Wisconsin Court said the following:

> "It must be here determined, therefore, whether the provisions of the franchise relating to the *extent of space* of pavement on a street occupied in part by a street car company for which the municipality here insists it may compel the street car company to pay, partakes of the nature of a contract, or is a mere rule or regulation which, irrespective of the provisions seemingly to the contrary in any such ordinance, the municipality may alter by virtue of the power resting in it while exercising a governmental function or by virtue of a power given to it under Sec. 1862, Stats."

and on page 495 the Court said:

> "What the city here asks of the defendant, namely, to pay for the cost of the pavement between the tracks as one item and for the cost of the additional width of ten or fourteen feet of the pavement required because of street car traffic as another item, *involves a question of space* to be covered by the pavement *rather than one as to the kind of material* which shall be used in paving any such space. In the former there is the idea of fixity or permanence, an element as capable of as accurate and absolute determination at the time when a franchise is passed and accepted as it can be thereafter. The one is immutable, the other from its very nature is subject to constant change and possible improvement."

and then the real decision of the case is on page 496, as follows:

> "The obligation, therefore, as to the amount of *space* which defendant might be required to pay for the paving being one as to which the parties might lawfully contract, and having by Sec. 5 fixed their respective rights and liabilities, it became a binding contract beyond the power of the city, without the consent of the other party, to alter, either by the ordinance of June 9, 1915, quoted above, or by any power granted by Sec. 1862, Stats."

In its last analysis the *Superior Case* was a decision to the effect that the *amount of space* to be paved in a street by the company was a fit subject of contract because no police power or regulatory power attached thereto, and this is not at all inconsistent with the decision of the Wisconsin Court in the case at bar to the effect that the material to be used or the condition in which the space is to be kept is a fit subject for regulation and is a subject to which the police power attaches, because the material to be used is the question immediately associated with public safety.

See the decision of the Supreme Court of Wisconsin in the case at bar, 165 Wis. 230, at page 236, where the Wisconsin Supreme Court said:

> "The question of repair of streets is fundamentally a police-power proposition and cannot be contracted away."

Section 1862 of the Wisconsin Statutes is correctly quoted at two places in the brief of plaintiff in error, i. e., pp. 11 and 43. The material part is as follows:

> "Every such road shall be constructed upon the most approved plan and be *subject to such reasonable rules and regu-*

lations and the payment of such license fees as the proper municipal authorities may by ordinance, from time to time, prescribe."

This Court held in the *Milwaukee Fare Case, (The Milwaukee Electric Railway & Light Co. vs. Railroad Commission of Wisconsin,)* 238 U. S.174, where it discussed this provision of the Wisconsin Statutes, that a regulation of fares by the state authorities was within this reserved power of control, and affirmed the decision of the Supreme Court of the State of Wisconsin to the effect that the 1900 ordinance prescribing fares in the City of Milwaukee was not a contract beyond the power of subsequent regulation.

The question of rate regulation is not a police power proposition but the question of the safety of our streets has been a police power regulation for generations before street cars were even thought of, and even if a city and a street railway company should enter into an instrument concerning the pavement to be used in the railway zone, which instrument in unmistakable terms would be cal'ed a contract, it still remains a clear proposition of law that as long as the safety of the streets is a police power question, the parties have no capacity to enter into a binding contract upon the subject. As to whether or not the *space* the company shall keep in repair shall be seven feet wide or eight feet wide is clearly a subject of contract, and that was what the Wisconsin Supreme Court decided in the *Superior Case* discussed above herein.

The Wisconsin Supreme Court held in the case at bar:

> "So the case at bar comes squarely within the rule of the *Madison Case." (Madison vs. Southern Wisconsin Railway Co.,* 156 Wis. 352, citing *State ex rel. Milwaukee vs. The Milwaukee Electric Railway & Light Co.,* 165 Wis. 230, at page 236.)

The Madison decision was affirmed in this Court, as already pointed out herein. *(Southern Wisconsin Railway Co. vs. City of Madison,* 240 U. S. 457.)

It is respectfully submitted that the Madison decision is identical with the case at bar and controlling of the same, and that the Wisconsin Supreme Court has not changed its position in the *Superior Case,* and for that reason the judgment of the Supreme Court of the State of Wisconsin in the case at bar should be affirmed.

CLIFTON WILLIAMS,
City Attorney of the City of Milwaukee.
Attorney for Defendant in Error.

MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY *v.* STATE OF WISCONSIN EX REL. CITY OF MILWAUKEE.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 55. Argued November 10, 1919.—Decided March 1, 1920.

When it is claimed that the obligation of a contract is impaired by a state law, this court inclines to accept the construction placed upon the contract by the Supreme Court of the State, if the matter is fairly in doubt. P. 103.

A street railway franchise declared it the duty of the grantee company "at all times to keep in good repair the roadway between the rails and for one foot on the outside of each rail as laid, and the space between the two inside rails of its double tracks with the same material as the city shall have last used to pave or repave these spaces and the street previous to such repairs," unless the company and the city agreed on some other material. In the absence of such an agreement, *held*, that the company's obligation extended to the use of materials

adopted by the city in repaving the rest of the street which were not the same as the city had last used in repaving between and near the rails. P. 103.

Where a street railway company by franchise contract with a city undertakes to repave between and next its rails with such material as the city used in repaving the rest of the street, and the city's regulatory power in respect of paving has not been precluded by contract, it is for the city to determine in the first instance what kind of pavement the public necessity and convenience demand. *Held*, in such a case, that the court could not say that it was inherently arbitrary and unreasonable to require the company to instal asphalt on a concrete foundation which the city had adopted to replace macadam and which was more expensive. P. 104.

A street railway company cannot escape a contractual duty to repave between and next its tracks upon the ground that the expense will reduce its income below six per cent., claimed to be not a reasonable return upon property used and useful in its business. *Id.*

The Fourteenth Amendment in guaranteeing equal protection of the laws does not assure uniformity of judicial decisions; and there is clearly no ground for the contention that such protection is denied because the state court, after a judgment complained of, rendered another, claimed to be irreconcilable with it on a matter of law, in a suit between strangers. P. 105. *Gelpcke* v. *Dubuque*, 1 Wall. 175, and *Muhlker* v. *New York & Harlem R. R. Co.*, 197 U. S. 544, distinguished.

166 Wisconsin, 163, affirmed.

THE case is stated in the opinion.

Mr. Edwin S. Mack, with whom *Mr. George P. Miller* and *Mr. Arthur W. Fairchild* were on the brief, for plaintiff in error.

Mr. Clifton Williams for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

A petition for a writ of mandamus was brought by the City of Milwaukee in a lower court of the State of Wis-

consin to compel the Milwaukee Electric Railway and Light Company to pave at its own expense with asphalt upon a concrete foundation that portion of Center Street, called the railway zone, which lies between the tracks and for one foot outside of them. The paving had been specifically ordered on November 8, 1915, by a city ordinance after the city had laid such a pavement on all of the street except the railway zone. Theretofore the street had been paved from curb to curb with macadam. The company admitted that the railway zone was in need of repaving at that time; but it insisted that under an ordinance of January 2, 1900, which constituted its franchise to lay tracks on Center Street, it was entitled to repair with macadam and could not be compelled to repave with asphalt.

The case was heard in the trial court on a demurrer to the amended return. The demurrer was sustained; and the decision was affirmed by the Supreme Court (165 Wisconsin, 230). The company having failed after remittitur to file an amended return or take further action, judgment was entered by the trial court awarding a peremptory writ of mandamus directing it to pave the railway zone as directed in the ordinance. This judgment also was affirmed by the Supreme Court (166 Wisconsin, 163). The case comes here on writ of error under § 237 of the Judicial Code. The single question presented is whether the ordinance of November 8, 1915, is void either under § 10 of Article I of the Federal Constitution as impairing contract rights of the company or under the Fourteenth Amendment as depriving it of property without due process of law. The ordinance of January 2, 1900, which is the contract alleged to be impaired by the later ordinance, provides as follows:

"Sec. 2. . . . It shall be the duty of said railway company at all times to keep in good repair the roadway between the rails and for one foot on the outside of each rail

as laid, and the space between the two inside rails of its double tracks with the same material as the city shall have last used to pave or repave these spaces and the street previous to such repairs, unless the said railway company and the board of public works of said city shall agree upon some other material, and said company shall then use the material agreed upon. . . ."

The company contends that when this section is read in connection with § 9, it clearly appears that the obligation to repave cannot be imposed.

First: The Supreme Court of the State held that the language of § 2 was not distinguishable from that involved in earlier cases in which it had held that a duty to keep "in proper repair" without qualification was broad enough to require repaving and repairing with the same material with which the street was repaved. When this court is called upon to decide whether state legislation impairs the obligation of a contract, it must determine for itself whether there is a contract, and what its obligation is, as well as whether the obligation has been impaired. *Detroit United Railway* v. *Michigan*, 242 U. S. 238, 249. But, as stated in *Southern Wisconsin Ry. Co.* v. *Madison*, 240 U. S. 457, 461, "the mere fact that without the state decision we might have hesitated is not enough to lead us to overrule that decision upon a fairly doubtful point." Among the cases relied upon by the state court is *State ex rel. Milwaukee* v. *Milwaukee Electric Ry. & Light Co.*, 151 Wisconsin, 520, which was cited by this court in the *Madison Case* (p. 461) as a "persuasive decision [s] that the obligation to keep the space 'in proper repair' . . . extends to" repaving the railway zone with asphalt when the rest of the street is being repaved with that material. But the company points to the clause in the ordinance of January 2, 1900, which provides for repair "with the same material as the city shall have last used to pave or repave these spaces and the street,"

and insists that its obligation is, in any event, limited to repaving with such material as the city had last used between the rails. This would put upon the city the burden of paving the whole street in case of any innovation in paving save by agreement of the company and the city. It is not a reasonable construction of the provision.

Second: Granted the duty to repave, and to repave with material other than that last used in the space between the tracks, was it reasonable for the city to require that the pavement be of asphalt upon a concrete foundation—a pavement which involved larger expense? The city alleged in its petition that the use of macadam by the railway was unreasonable, and that it is physically impossible to make a water-tight bond between the water-bound macadam and the asphalt, so as to prevent water from seeping through under the asphalt, causing it to deteriorate in warm weather and to be lifted by freezing in cold weather. The allegation was not expressly admitted by the return and must be deemed to have been covered by its general denial of all allegations not expressly admitted; but neither party took steps to have this formal issue disposed of. The case differs, therefore, in this respect from the *Madison Case*, where there was an express finding that repavement of the railway zone with stone would have been unsuitable when the rest of the street was of asphalt (p. 462). The difference is not material. As the ordinance did not, as a matter of contract, preclude regulation in respect to paving, it was for the city to determine, in the first instance, what the public necessity and convenience demanded. Compare *Fair Haven & Westville R. R. Co.* v. *New Haven*, 203 U. S. 379. We cannot say that its requirement that the railway zone be paved like the rest of the street with asphalt upon a concrete foundation was inherently arbitrary or unreasonable.

Third: The company insists that the ordinance of

November 8, 1915, is unreasonable and void, also, for an entirely different reason. It alleges in its return that for a long time prior to that date the earnings from its street railway system in Milwaukee were considerably under six per cent. of the value of the property used and useful in the business and were less than a reasonable return. It contends that this allegation was admitted by the demurrer; and that to impose upon the company the additional burden of paving with asphalt will reduce its income below a reasonable return on the investment and thus deprive it of its property in violation of the Fourteenth Amendment. The Supreme Court of the State answered the contention by saying, "The company can at any time apply to the railroad commission and have the rate made reasonable." The financial condition of a public service corporation is a fact properly to be considered when determining the reasonableness of an order directing an unremunerative extension of facilities or forbidding their abandonment. *Mississippi Railroad Commission* v. *Mobile & Ohio R. R. Co.*, 244 U. S. 388; *New York & Queens Gas Co.* v. *McCall*, 245 U. S. 345, 350. But there is no warrant in law for the contention that merely because its business fails to earn full six per cent. upon the value of the property used, the company can escape either obligations voluntarily assumed or burdens imposed in the ordinary exercise of the police power. Compare *Missouri Pacific Ry. Co.* v. *Kansas*, 216 U. S. 262, 279; *Chicago, Rock Island & Pacific Ry. Co.* v. *Arkansas*, 219 U. S. 453; *Missouri Pacific Ry. Co.* v. *Omaha*, 235 U. S. 121.

Fourth: The company also insists that the ordinance is void because it denies equal protection of the laws. The contention rests upon the fact that since entry of the judgment below the Supreme Court of the State had decided *Superior* v. *Duluth Street Ry. Co.*, 166 Wisconsin, 487, which the company alleges is not reconcilable with

its decision in this case. The similarity of the ordinances and conditions in the two cases does not seem to us as clear as is asserted. But, however that may be, the Fourteenth Amendment does not in guaranteeing equal protection of the laws, assure uniformity of judicial decisions, *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 569, any more than in guaranteeing due process it assures immunity from judicial error, *Central Land Co.* v. *Laidley*, 159 U. S. 103; *Tracy* v. *Ginzberg*, 205 U. S. 170. Unlike *Gelpcke* v. *Dubuque*, 1 Wall. 175, and *Muhlker* v. *New York & Harlem R. R. Co.*, 197 U. S. 544, where protection was afforded to rights acquired on the faith of decisions later overruled, the company seeks here to base rights on a later decision between strangers which, it alleges, is irreconcilable on a matter of law with a decision theretofore rendered against it. The contention is clearly unsound.

As we conclude that there was a contractual duty to repave arising from the acceptance of the franchise, we have no occasion to consider whether there was, as contended, also a statutory duty to do so arising under § 1862, Wisconsin Statutes, which provides that street railways shall "be subject to such reasonable rules and regulations . . . as the proper municipal authorities may by ordinance, from time to time, prescribe."

Affirmed.

MR. JUSTICE PITNEY and MR. JUSTICE MCREYNOLDS dissent.